No. 15

In the Supreme Court of the United States

OCTOBER TERM, 1952

JOSEPH MANDOLI, ALSO KNOWN AS GUISEPPI MENDOLIA, PETITIONER

v.

DEAN ACHESON, SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Court of Appeals (R. 31–33) is reported at 193 F. 2d 920.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1952 (R. 34). The petition for a writ of certiorari was filed on February 19, 1952, and was granted on June 9, 1952 (R. 36). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1) and 2101 (c).

QUESTION PRESENTED

Whether petitioner, who was a citizen of the United States by virtue of his birth in this country, and a citizen of Italy by virtue of his parents' Italian citizenship at the time of his birth, and who was taken to Italy by his parents during his minority, has expatriated himself from his United States citizenship by remaining in Italy for nine years after attaining his majority (in 1928) before claiming United States citizenship.

STATUTES INVOLVED

1. The Act of July 27, 1868, 15 Stat. 223, R. S. 1999, now 8 U. S. C. 800, provides:

> Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.

2. Section 2 of the Act of March 2, 1907, 34 Stat. 1228, provided:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.
>
> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be over come on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That No American citizen shall be allowed to expatriate himself when this country is at war.

3. Pertinent provisions of the Nationality Act of 1940, 54 Stat. 1137, 8 U. S. C. 501, are reprinted in the Appendix, *infra,* pp. 94–97.

STATEMENT

Petitioner filed suit in the United States District Court for the District of Columbia under Section 503 of the Nationality Act of 1940 (8 U.

S. C. 903; 54 Stat. 1171) for a declaratory judgment that he is a United States citizen (R. 18–19). The only evidence introduced at the trial was his own testimony and four documentary exhibits. It showed, substantially, the following:

Petitioner was born in Ravenna, Ohio, on September 17, 1907 (R. 3, 22). His parents were citizens of Italy (R. 5, 22–23). They had come to this country in 1901 or 1902 (R. 9) but had not become citizens of the United States (R. 5). In 1907, when petitioner was about four months old, they returned to Italy, taking him with them (R. 3, 5, 8–9, 22). The Italian Government considered him a citizen of Italy at birth (R. 23).

According to petitioner's testimony, he attempted to come to the United States when he was about fifteen years of age, but the consul at Palermo informed him that he could not do so, as he was too young, and it would be necessary for another person to accompany him on the trip (R. 10).

Petitioner served in the Italian Army from April 14, 1931, to September 5, 1931 (R. 23, 30). He testified that his induction into the army was involuntary, after an unsuccessful protest on the ground that he was an American citizen (R. 5–6); and that he took no oath of allegiance to the King of Italy in connection with his service because he was sick in a hospital for almost the whole period of his service (R. 7).

This testimony was contradicted by the Government's exhibit number one, which was petitioner's sworn application for a certificate of identity, dated August 19, 1948, under the authority of which he was permitted to come to the United States to prosecute the present action (R. 30). In that application, he stated that he entered the Italian Army on April 14, 1931, without protest, and took an oath of allegiance to the King of Italy on May 24, 1931 (R. 30).

Although admitting that he signed this application (R. 11), petitioner maintained that the questions were read to him in English so that he did not understand them. He denied telling the American consul that he took an oath of allegiance to the King of Italy on May 24, 1931, denied that he did not protest against induction, and professed lack of understanding as to the meaning of paragraph 12 of the application (R. 14–15). The District Court found that he did not protest his induction into the Italian Army (R. 23).

Petitioner testified that in 1937, when he was 29 or 30 years old, he made his first attempt, after reaching majority, to come to the United States, but was refused permission because he had been in the Italian army (R. 10). In 1944, petitioner applied for an American passport at Palermo. This application was also denied (R. 7, 10, 30). In 1948, petitioner applied for the

certificate of identity already referred to, which was granted. He arrived in the United States on September 21, 1948. (R. 8, 30.)

The District Court entered judgment for the respondent, finding that petitioner (1) was, by birth, a national both of the United States and Italy, (2) had expatriated himself by taking an oath of allegiance to the King of Italy on May 24, 1931, and (3) had also expatriated himself by continuous residence in Italy after attaining his majority and by his failure to elect American citizenship by returning to the United States and taking up permanent residence there (R. 22–23, 24). The Court of Appeals unanimously affirmed the judgment (R. 34), holding that, where a dual national at birth is taken during minority to the country of his other nationality, continuous residence in that other country for an extended period, after attaining majority, results in loss of American nationality, without regard to the provisions for loss of nationality in the Act of 1907 or the subsequent Nationality Act of 1940.[1]

SUMMARY OF ARGUMENT

The District Court held that petitioner, a native born citizen who has also been an Italian national since birth, has expatriated himself by (a) taking an oath of allegiance to the King of Italy in 1931

[1] The Court of Appeals explicitly declined to consider whether the oath of allegiance which petitioner was required to take, when he was inducted into the Italian army, was in itself enough to expatriate him (R. 33).

in the course of Italian military service, and (b) by continuing to reside in Italy after he became 21 in 1928, without attempting to return here. The Court of Appeals passed the first point and affirmed on the second. In view of the Attorney General's ruling in 41 Op. Atty. Gen. No. 16, on the duress incident to military oaths of allegiance in Fascist Italy, we do not seek to support the judgment below on the first of the trial court's two bases. And we do not support the judgment on the ground taken by the Court of Appeals because we believe, after consideration of all the materials, that neither in 1928 nor thereafter was there any definite principle of American law requiring petitioner to elect American citizenship to the exclusion of Italian or to return to this country if he wished to remain an American.

I

The decision of the Court of Appeals rests mainly upon its interpretation of *Perkins* v. *Elg*, 307 U. S. 325, as imposing a duty upon *all* dual nationals residing abroad to elect American citizenship upon attaining their majority, and to take up residence in this country. But the holding of *Elg* is not a precedent for this case. It dealt only with the *right* of one form of dual national—a native child who was solely an American at birth and later acquired foreign citizenship through naturalization abroad—to return here and elect American citizenship upon reaching 21. The

case centers on retention of citizenship by such an infant American who did return; it did not deal with the case of a child or an adult who remained abroad. No matter how broadly it be construed, its holding does not establish the duty of a dual national at birth to make an election or lose his American nationality. At most, *Elg* holds that native-born citizens, whether dual or single nationals, cannot lose their constitutionally conferred citizenship during minority. Perhaps it even went so far as to rule that minors naturalized abroad, like Miss Elg, must elect between their two nationalities upon reaching 21. But it clearly does not *hold,* though it has sometimes been said to intimate (see *infra,* pp. 11–12), that dual nationals from birth, like petitioner, must make such an election. The Court is therefore now free to consider that problem on its merits, unshackled by precedent.

II

Admittedly, there is no statute or treaty which imposed a duty of election upon petitioner. The duty is said to be drawn entirely from extra-legislative sources. But a survey of these materials shows, in our view, that this principle of compulsory election has not received such definitive recognition that it could be said to form part of American nationality law in 1928 (when petitioner became 21) or thereafter. Nor is there any occasion for the Court to adopt it now.

A. 1. In the period before 1868, when the Fourteenth Amendment conferred citizenship as of right on native Americans and Congress made a general declaration of the right of expatriation (8 U. S. C. 800, *supra*, p. 2), almost the only claimed sources for the principle of compulsory election are judicial decisions. These do not indicate the establishment of the principle for dual nationals at birth. Some cases and opinions seem broadly to contemplate the indefinite continuance of such dual nationality, and at least one well-known lower court decision definitely disavowed any duty of election. The cases (*e. g., Inglis* v. *Trustees of the Sailor's Snug Harbor,* 3 Pet. 99, 126, and *Shanks* v. *Dupont,* 3 Pet. 242, 246–8) which have been cited as adopting the principle dealt, and recognized that they dealt, with the different situation of change from British to American allegiance after the Revolution. No case held or stated that there was a duty of election in circumstances comparable to petitioner's.

2. In the forty-year period from 1868 to 1907, when Congress first legislatively defined how the "right" of expatriation might be exercised (*supra,* p. 3), the pertinent materials were mainly State Department rulings.[2] That Depart-

[2] The Citizenship Board of 1906, a State Department group set up to make recommendations to Congress, did find the principle of compulsory election incorporated into our law, but it drew its conclusion entirely from the early cases which we believe do not support that result.

ment did apparently take the general view that a dual national at birth had to make an election shortly after majority, ordinarily by returning to the United States. But most, if not all, of these rulings were not in fact decisions on citizenship as such, but rather rulings on demands by dual nationals for protection against foreign mistreatment or military service, or administrative refusals to grant a passport for travel in foreign lands. And it has long been recognized that in circumstances indicating too close a connection with a foreign state the State Department may refuse protection or a passport even to an acknowledged American citizen.

3. After the passage of the Expatriation Act of 1907 (*supra,* p. 3), which admittedly did not adopt the principle of compulsory election for dual nationals at birth, the State Department continued for some time to express the same views as to the necessity of election, but always in rulings on protection or passports. However, beginning in 1921 and formally in 1926, the Department acknowledged that its rulings concerned only the right to protection or a passport and "that in the absence of legislative authority it was not warranted in declining to accord recognition as citizens of the United States to persons who were born in the United States of alien parents merely because they have resided abroad for protracted periods before and

after attaining majority." III Hackworth, *Digest of International Law* (1942), at p. 371. The Immigration and Naturalization Service has taken the same position. *In the Matter of R.*, 1 Dec. Imm. and Nat. Laws 389. If petitioner had inquired from either of these agencies, in 1928 or thereafter, whether he had to make an election, the reply would have been negative.

The sparse judicial treatment of the subject since 1907 tends in both directions. There are a few holdings and dicta rejecting the duty of election, counterbalanced by some dicta affirming it. Of greatest significance is some language in *Perkins* v. *Elg*, 307 U. S. 325, 329, 334, which the court below and some others have felt recognizes the duty of election for a case such as this. These few words, casually equating the "right" of expatriation of "a child born here, who may be, or may become" a dual national, are at most *obiter* or tentative suggestion. But when read in context, even when taken together with the citation of early State Department rulings of the type referred to above, these remarks do not seem to us to endorse the principle of compulsory election for a dual national by birth. That problem was not before the Court and it did not discuss or mention the significant 1921 shift in the State Department rulings, which was apparently not called to its attention. The focus of concern, as pointed out above (*supra*, pp. 7–8), was on the

right of a minor naturalized abroad to elect American nationality on reaching adulthood. The words the Court used, its reference to administrative rulings, were all in the effort to show that Swedish naturalization during minority could not, and had not been held to, bind the infant dual national against her adult will to be an American.

B. It has occasionally been suggested that there is a rule or principle of international law imposing a duty of election on dual nationals which the Court should apply as a matter of domestic law. But the existence of such a definite principle of international law, capable of immediate judicial application, has been denied by publicists and is disproved by the great variation in the statutory provisions as to election adopted by the other countries which have sought to deal with the problem of dual nationality.

C. Indeed, the differences in these statutory provisions suggest that the recognition or enactment of a principle of compulsory election is a legislative function. And particularly where citizenship is conferred by the Constitution, as here, does it seem appropriate to leave the matter for Congress. This is all the more so now that Congress has legislated for the future, in a very detailed way, in the Immigration and Nationality Act of 1952.

III

As Point II shows, we believe that the principle of compulsory election has not achieved authoritative recognition from courts, administrators, or publicists. We also suggest that, whether or not this is so, the expatriation legislation of 1907 and 1940 has precluded application of the principle since 1907.

A. When Congress was considering the bill which became the Act of March 2, 1907 (*supra*, p. 3), it had before it detailed recommendations, by an *ad hoc* State Department Citizenship Board, for presumptive expatriation of *all* Americans residing continuously abroad, as well as for an election at 18 by all American boys residing abroad. Congress rejected these proposals as applied to native-born Americans and limited the first to naturalized citizens and the second to foreign-born children of Americans. The whole tenor of the Act, as adopted, rejects the idea of foreign residence alone as a basis for loss of citizenship by native-born citizens. Moreover, Congress had all phases of dual nationality before it but chose to impose loss of American nationality (or even loss of protection) only in the case of certain classes like American women married to foreigners, naturalized citizens, or foreign-born American children. In these circumstances, we believe that in the 1907 Act Congress rejected a duty of election for dual nationals at birth and

precluded judicial or administrative recognition of such a duty. We also suggest, less strongly, the broader proposition that the 1907 Act defined the exclusive modes of expatriation, leaving nothing for judicial or departmental development.

B. Since petitioner came of age in 1928, the Nationality Act of 1940 does not directly affect this case, but it is our view that, like the 1907 Act, it rejected any duty of election for native-born dual nationals and set forth the exclusive bases for loss of nationality. The legislative history shows that a provision requiring election, deemed by its sponsor to be a change in the law, was omitted from the bill because the drafters were unable to agree that such a provision was desirable. Since the problem of dual nationality was placed before Congress, and dealt with (in a manner not affecting petitioner) in Section 402, 8 U. S. C. 802, we think the omission of an election requirement must be deemed a rejection of the duty and not merely a decision to leave the matter for judicial determination.

Moreover, the 1940 Act is a comprehensive statute covering all phases of nationality, codifying the former law of expatriation and creating new grounds. It leaves no gaps. Section 468, 8 U. S. C. 808, expressly provides that the means of expatriation prescribed in the Act will be exclusive.

C. For the future, the issue is settled by the Immigration and Nationality Act of 1952, which

adopts detailed provisions for dual nationals at birth who reside abroad, requiring an election but with several exceptions and qualifications. Even the new Act, however, stresses as a condition of expatriation the voluntary seeking of the benefits of the foreign nationality and appears to indicate that mere residence abroad is not an election against United States nationality.

ARGUMENT

INTRODUCTION

The District Court held that petitioner had expatriated himself on two grounds (R. 23): (a) by taking an oath of allegiance to the King of Italy in the course of military service, and (b) by continuing to reside in Italy for several years after he attained his majority in 1928, without attempting to return to the United States. The Court of Appeals affirmed on the second ground, and did not pass upon the first (R. 33).

In view of the ruling by the Attorney General, on May 8, 1951, in the very similar *Panzica* case (41 Op. Atty. Gen. No. 16), to the effect that "the choice of taking the oath or violating the law was, for a soldier in the army of Fascist Italy, no choice at all," and that the oath there could "only be regarded as having been taken under legal compulsion amounting to duress," we do not seek to support the affirming judgment below upon the first of the two grounds taken by the District Court. Since the Court of Appeals did

not consider that point we need not elaborate upon the Attorney General's formal opinion.

The actual issue before the Court is, then, whether it should adopt the rule pursuant to which the Court of Appeals held that petitioner had lost his American nationality, *i. e.*, that a dual citizen at birth, taken to the country of his other nationality (Italy) during his minority and residing in that country continuously until he reached his majority (in 1928), was required to take prompt and affirmative steps to return to this country to indicate a choice of United States nationality, or be held to lose it. (For shorthand purposes, we shall sometimes call this the "principle of compulsory election.") The court below, accepting the position then advanced by the Government, thought that the application of this rule was required by the decision and opinion of this Court in *Perkins* v. *Elg*, 307 U. S. 325 (1939).

The Government now believes, as was indicated in the Memorandum for the Respondent on the petition for certiorari, that this view is erroneous.[3] A complete study has led to the conviction

[3] The Solicitor General did not authorize an appeal in *Tomasicchio* v. *Acheson*, 98 F. Supp. 166 (D. D. C., June 18, 1951)—where, on facts essentially similar to those here, the trial court held that the claimant had not lost his American citizenship—because the District Court's ruling on this point was viewed as correct. Unfortunately, this conclusion, which was finally reached on November 2, 1951, was not communicated in due time to the United States Attorney who handled the instant case below. This case was argued

that neither in 1928, when petitioner became 21, nor after the effective date of the Nationality Act of 1940, was there any definite principle of American law requiring an election of United States citizenship by one in petitioner's situation. Such a requirement was recently imposed for the first time by the Immigration and Nationality Act of 1952 (*infra*, pp. 88–91). And in our view the *Elg* case did not say or hold that there was such a requirement in or before 1939. However, since the pertinent materials do not look only in one direction, we endeavor to present them all, pro or con, for the Court's information.[4]

It is our conclusion, *first*, that the holding of the *Elg* case did not adopt the principle of compulsory election for the circumstances now before the Court and, *second*, that an historical survey of the legislative, judicial, and administrative treatment of the problem shows that no such principle was embodied in the law prior to 1952. *Third*, we believe that, in any event, the determination of how nationality may be lost is normally a legislative function and that both the Act of March 2, 1907, which defined how the right of expatriation might be exercised at the

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in the court below on November 6, 1951, and was decided on January 10, 1952 (R. 31).

[4] *Kawakita* v. *United States*, 343 U. S. 717, did not pass upon the past or present existence of a duty of election by dual nationals at majority, and expressly left open the question for the period governed by the Nationality Act of 1940 (at p. 731).

crucial periods here involved, as well as the later Nationality Act of 1940, stated the exclusive bases for such loss of citizenship. As they do not include expatriation for dual nationals at birth according to a principle of compulsory election, and, indeed, on examination, would seem rather clearly to imply its exclusion, petitioner cannot be deemed to have expatriated himself by failing to make an election in the years after he reached his majority in 1928.

I. THE HOLDING OF PERKINS V. ELG DOES NOT SUPPORT THE DECISION BELOW

The decision of the Court of Appeals is based principally on its construction of the judgment of this Court in *Perkins* v. *Elg*, 307 U. S. 325, as recognizing a *duty* of election by all dual citizens, as something separate and apart from statutory provisions for loss of nationality. We treat this contention first in order to show at once that there is no decision in this Court on the point—since the holding of the *Elg* case does not support the view that an election must be made in this type of case—and that therefore the Court is not precluded by precedent from examining the question.

Miss Elg, the plaintiff, was born in the United States of Swedish parents. Her father had been naturalized here at the time of her birth, with the consequence that she was born an American national only. While she was still a minor, her parents returned to Sweden to live, thus causing

her father to reacquire Swedish citizenship under the terms of the Swedish-American treaty of 1869. She was taken to Sweden by her parents when she was four years old and remained there during the balance of her minority.

Within eight months after she became 21, Miss Elg applied for and was issued an American passport, and returned to this country. She thereafter lived here undisturbed for over five years. It was then concluded by American immigration officials, that, under Swedish law, Miss Elg became a naturalized citizen of Sweden at the time that her father resumed his Swedish citizenship, and that, accordingly, she also had lost her American citizenship at that time. Taking the position that Miss Elg had, therefore, been unlawfully admitted into the United States, the Secretary of Labor began proceedings to deport her.

This Court upheld an action brought by Miss Elg for a declaration that she was an American citizen, to restrain the Secretary of Labor and Commissioner of Immigration from prosecuting proceedings for her deportation, and to restrain the Secretary of State from refusing to issue her a passport on the ground that she was not a citizen.

The basic issue was whether Miss Elg, by acquiring Swedish citizenship, had lost American citizenship. The Government urged first that by virtue of a treaty of 1869, between the United

States and Sweden, the United States was required to treat her as a Swedish citizen because under Swedish law she had become a Swedish citizen on her father's resumption of his Swedish citizenship.[5] It was additionally urged that, even without reference to the treaty, her derivative naturalization in Sweden terminated her American citizenship under Section 2 of the Act of March 2, 1907, *supra*, p. 3, which provided that any American citizen should be deemed to have expatriated himself when he had been naturalized in a foreign state in conformity with its laws.

Both of these contentions of the Government were answered by the Court in the same way: There could be no expatriation, either under the treaty or under the 1907 Act, unless it were voluntary on the part of the citizen; and there could be no such voluntary act when the citizen was a minor.

Examination of the *Elg* opinion shows that its broadest holding was this:—It was a "necessary consequence of the constitutional provision by which persons born within the United States and subject to its jurisdiction become citizens of the United States [that to] cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action and

[5] It was also required by Swedish law that she be resident with her father, as she was.

such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of binding choice" (307 U. S. at 334).[6]

This was the broadest holding of *Elg*, and it is plain that, thus stated, it does not support the decision below. A holding that a minor, who is a native-born American citizen naturalized abroad, cannot voluntarily expatriate herself while a minor is not a holding that all minors who have dual allegiance, in whatever manner acquired, are required at majority promptly to elect American citizenship, if they would continue to have it. The *Elg* decision holds only that Miss Elg's constitutionally ordained citizenship could not be taken away from her on the basis of anything done by or for her during childhood. The holding of the case is not about the ways in which citizenship may be lost. It is about one way it may not be lost.

We discuss below (*infra*, pp. 42–51), in connection with the historical survey of the so-called "election" principle, certain language in the *Elg* opinion which has been thought to endorse the doctrine that there is a *duty*, as well as a *right*, of election at majority by dual nationals from birth.

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[6] See Sandifer, *The Elg Case; Election of Citizenship at Majority by Minors*, (1940) 14 U. Cin. L. Rev. 423, 435–436.

II. THERE HAS NOT BEEN, UNDER AMERICAN LAW, ANY PRINCIPLE OF COMPULSORY ELECTION FOR DUAL NATIONALS AT BIRTH, WHO ARE TAKEN DURING MINORITY TO THE COUNTRY OF THEIR OTHER NATIONALITY, AND ARE RESIDING THERE AT MAJORITY

Everyone admits that neither the Act of March 2, 1907, nor the Nationality Act of 1940, nor any treaty pertinent to this case, requires a dual national at birth, like petitioner, who is taken during minority to the country of his other nationality, to make an election of citizenship on reaching his majority. The Court of Appeals and others who adopt the principle of compulsory election for dual nationals at birth draw it entirely from extra-legislative sources.[7] In this Point, we survey these extra-legislative materials and conclude that this principle, although it has been sometimes adumbrated in tentative form, has not received such definitive recognition from courts or administrative officials that it could be said to have formed a part of the American law of nationality in 1928, when petitioner became 21, or thereafter. In the next Point (Point III), we discuss the broader question whether the two statutes—the Act of March 2, 1907 and the Nationality Act of 1940—provided the exclusive methods for expatriation of Americans after 1907, whatever may have been the extra-legislative rules in effect before that time or developed thereafter.

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[7] On dual nationality, generally, see *Kawakita* v. *United States*, 343 U. S. 717, 723–725, 734–736.

A. *A survey of the judicial and administrative treatment of dual nationality shows that the principle of compulsory election has not been adopted* [8]

1. *Until 1868*

In the early years of our independence as a nation, there was considerable question, stemming from the old common-law rule of perpetual allegiance, whether an American could expatriate himself without the sovereign's consent, explicit or implied. See *Talbot* v. *Jansen,* 3 Dall. 133, 164–165; *The Charming Betsy,* 2 Cranch 64, 120; *Shanks* v. *Dupont,* 3 Pet. 242, 246; 2 Kent, *Commentaries,* sec. 49; *Mackenzie* v. *Hare,* 239 U. S. 299, 309; *Savorgnan* v. *United States,* 338 U. S. 491, 498. In this connection, the existence of dual nationality was specifically recognized and some authorities apparently assumed that a dual national would continue indefinitely to be a citizen of another country without necessarily affecting his allegiance to this one. See *Talbot* v. *Jansen,*

[8] The development of the general American doctrine of expatriation, with its vicissitudes before the 1850's is described in III Moore, *Digest of International Law,* Secs. 431–469; III Hackworth, *Digest of International Law,* Secs. 242–250; II Hyde, *International Law Chiefly as Interpreted and Applied in the United States* (1945 ed.) Secs. 376–387A; Moore, *The Principles of American Diplomacy,* ch. VII, reported in IV *Collected Papers of John Bassett Moore,* pp. 388–406; Flournoy, *Naturalization and Expatriation* (1922) 31 Yale L. J. 702, 848; Tsiang, *The Question of Expatriation in America prior to 1907* (1942), Johns Hopkins University Studies in Historical and Political Science, Series LX, No. 3; Brief for the Petitioners, pp. 20–27, in *Perkins* v. *Elg,* Oct. Term, 1938, No. 454.

supra, at 164–5, 169; *The Charming Betsy, supra*, at 120; *Case of Isaac Williams*, opinion of Ellsworth, C. J., 2 Cranch 82–83, *fna.*; *Inglis* v. *Trustees of the Sailor's Snug Harbour*, 3 Pet. 99, at 157; *Shanks* v. *Dupont, supra*, at 247, 249; *Lynch* v. *Clarke*, 1 Sandf. Ch. (N. Y.) 583, 659, 677–9; *Ludlam* v. *Ludlam*, 26 N. Y. 356, 376–7; *Calais* v. *Marshfield*, 30 Me. 511, 518–520 (1849).

There were also, however, some judicial statements during our first seventy-five years under the Constitution which have been cited as espousing the doctrine of compulsory election for dual nationals.[9] As we read these cases, they furnish weak support for that view. *Inglis* v. *Trustees of the Sailor's Snug Harbor*, 3 Pet. 99, involving *inter alia* the right of the claimant to inherit certain New York land, does contain the following dictum (at p. 126):

> If [claimant were] born after the 4th of July 1776, and before the 15th of September of the same year, when the British took possession of New York, his infancy incapacitated him from making any election for himself, and his election and character followed that of his father, subject to the right of disaffirmance in a reasonable time after the termination of his minority; which never having been done,

[9] See Report of the Citizenship Board of 1906 (discussed below, pp. 32–33, 68–72), H. Doc. No. 326, 59th Cong., 2d Sess., pp. 74–76, 79–80; Borchard, *Diplomatic Protection of Citizens Abroad* (1915), Sec. 259, pp. 584–5.

he remains a British subject, and disabled from inheriting the land in question.

But the case is certainly not strong on any doctrine of compulsory election for dual nationals at birth. It involved, as the Court specifically emphasized, not "the right of expatriation, under a settled and unchanged state of society and government * * * but the rights of the individuals composing that society, and living under the protection of that government, when a revolution occurs, a dismemberment takes place, new governments are formed, and the new relations between the government and the people are established" (p. 120). To the extent that it discusses the choice of British or American allegiance after the Revolution, *Shanks* v. *Dupont,* 3 Pet. 242, 246–8 (an American woman who married a British officer in 1781, and went to live in England in 1782), rests on the same special footing, as do the State court cases of *Trimbles* v. *Harrison,* 40 Ky. 140, 145–7 (1 B. Mon. (Law & Eq. cases) (woman born in this country in 1773 and taken to England before 1798 where she married in that year) and *Calais* v. *Marshfield,* 30 Me. 511 (man born in Maine in 1774 who went to Canada in 1795).

Jones v. *McMasters,* 20 How. 8, 20, applied the same principles to a case arising out of the separation of Texas from Mexico and its joining the Union. The plaintiff's right to maintain a suit in a federal court was challenged on the ground that she was not an alien. It was shown that she

was born at a place which, at the time of her birth, was part of the Republic of Coahuila and Texas, when that in turn was a part of the Republic of Mexico. Her parents were not citizens of the United States. During her minority, and before Texas declared its independence, she was removed from the town of her birth to a place in Mexico which never became part of the United States, and she continued to reside there. It was held that she was a Mexican citizen, but a dictum apparently assumes that she could by proper action have elected Texas nationality. Even if this assumption be given full credit, the case cannot be said to involve a true dual nationality problem at all, but only the right of an individual belonging at birth solely to one sovereignty (Mexico) to choose the nationality of her birthplace (Texas) when it later became independent. Whatever right of election of Texas or United States citizenship this plaintiff might have had throws little light on any principle of compulsory election broad enough to solve the problem of the petitioner now before the Court.

Lynch v. *Clarke*, 1. Sandf. Ch. 583 (N. Y. 1844), which is also sometimes said to support a doctrine of compulsory election, has precisely the opposite tendency. The young woman—born in the United States of alien parents but shortly taken to Ireland—whose American citizenship was upheld was still a minor at the critical date, but the court took pains explicitly to repudiate the doc-

trine of compulsory election as applicable to a native born child of foreign parents (at p. 673–4), and it referred to the *Inglis, Shanks,* and *Trimbles* cases (*supra,* pp. 24–25) as "growing out of the anomalous state of allegiance produced by the Revolution" which "cannot with propriety, be deemed authorities against well established principles * * *" (at p. 683).

Similarly, *Ludlam* v. *Ludlam,* 26 N. Y. 356, an early case on the citizenship of the foreign-born son of an American citizen, expressly recognizes the possibility of dual nationality (at pp. 376–7) and merely suggests that the "difficulties" and "inconveniences" which may arise from such double status might possibly be "surmounted" (p. 377):

> No such difficulty would be likely to arise during his minority, and on his arriving at maturity *he would have the right* to elect one allegiance and repudiate the other, and such election would be conclusive upon him, and *would doubtless be respected by the governments.*
>
> However this may be, the inconveniences of such double allegiance are rather theoretical than real. * * * [Italics supplied.]

The court did not say or intimate that the dual national had to make an election if he were willing to bear the "inconveniences" of his status, which were "rather theoretical than real". Its

discussion, here and elsewhere (see pp. 371–2), is in terms of the "right" and not the duty of election. (See also pp. 50–51, *infra*.)

Our conclusion is that there was not established in the early period (1789–1868) any principle of compulsory election for dual nationals at birth. Some cases and opinions seemed broadly to envisage the indefinite continuance of dual nationality in adulthood, and at least one decision expressly disavowed the duty of election. The decisions which have been cited as adopting it dealt, and recognized that they dealt, with the different situation of change from British to American allegiance after the Revolution, or change from Mexican to American allegiance after Texas became a State. No case held or stated that there was a duty of election in circumstances comparable to those now before the Court.[10] It is also very significant, we think, that whatever consideration was given in this period to dual nationality pre-dated the Fourteenth Amendment, which for the first time gave American citizenship to native-born children as a matter of constitutional right.[11]

[10] Most of these cases, and other later ones, are reviewed by Flournoy, *Dual Nationality and Election* (1921) 30 Yale L. J. 545, 693, 697–701, who concludes (p. 701): "It is obvious from the above discussion, that the right of election * * * cannot be said to have been established as a part of the municipal law by the decisions of the courts of this country."

[11] We have not found any State Department rulings on the question in the period before 1868.

2. From 1868 to 1907

The period from 1868 to 1907 was opened by the simultaneous adoption of the Fourteenth Amendment—with its declaration that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside"—and of the Act of July 27, 1868, 8 U. S. C. 800 (*supra*, p. 2) definitively incorporating the general right of expatriation into our law.[12] During the forty-year period in which these two enactments formed the sole legislative provisions bearing on the expatriation of Americans, almost the only source of development of the principles applicable to dual nationality were various rulings of the Department of State. Reliance has been mainly placed on these rulings for the view that American law has adopted a principle of compulsory election at majority.[13]

It is true that, during these years, there were statements made in State Department rulings on

[12] The 14th Amendment was declared by Congress to be a part of the Constitution on July 21, 1868, and was officially promulgated by the Secretary of State on July 28, 1868, one day after the enactment of the expatriation act.

[13] Van Dyne, *Citizenship of the United States* (1904), pp. 24–31, rests almost entirely on these rulings. Borchard, *Diplomatic Protection of Citizens Abroad* (1915), Sec. 259, bases his view both on the rulings and on the early cases discussed above at pp. 24–28. There is also some suggestion in Borchard that the principle of compulsory election is a rule of international law. We discuss this latter view below at pp. 52–62.

the rights of putative Americans overseas which can be read to mean that there was a requirement that dual nationals at birth, who had been taken to the nation of their other nationality during minority, had to make an election of American nationality shortly after majority. The inference is that if they did not, they lost their citizenship—that is, they were expatriated.

This position was apparently taken frequently between 1868 and 1907, when Congress first legislatively defined how this "right" might be exercised. See, e. g., Bacon, Acting Secretary of State, to German Ambassador, Nov. 20, 1906, I Foreign Relations, 1906, at 656–657, cited in *Perkins* v. *Elg*, 307 U. S. at 332–333; III Moore, *Digest of International Law* (1906), Secs. 428, 430; Van Dyne, *Citizenship of the United States* (1904), pp. 26–31.

But, as has been repeatedly pointed out, most, if not all, of the State Department rulings stating this requirement were not in fact rulings on citizenship as such, but were rulings that the failure to make post-majority election resulted (a) in loss of the right to protection against foreign military service or mistreatment or (b) in deprivation of the right to the grant by the United States of a passport for travel in foreign lands. See *e. g.*, Flournoy, *Dual Nationality and Election* (1921), 30 Yale L. Journ. 545, 563; The Director of the Consular Service (Carr) to the Consul at Helsingfors (Davis), July 18, 1921, MS Dept. of State, file 130 P7574, III Hack-

worth, *Digest of International Law,* at 370; Mr. Bayard, Secretary of State, to Mr. Lee, Chargé at Vienna, July 24, 1886, Foreign Relations, 1886, 12, III Moore, *Digest of International Law,* pp. 546–547; Mr. Tripp, Minister at Vienna, to Mr. Olney, Secretary of State, June 30, 1895, Mr. Adee, Acting Secretary of State, to Mr. Tripp, July 23, 1895, I Foreign Relations, 1895, 20–22, III Moore, at 549–550. The general view of the Department was at that time and continued to be that there could be such association with, and such acceptance of benefits from, another nation as to foreclose any equitable right to insist on protection from the United States or an American passport, without there being at the same time any necessity or propriety of a determination of loss of citizenship. See Mr. Root, Secretary of State, to Diplomatic and Consular Officers, April 19, 1907, quoting Circular of March 27, 1899, I Foreign Relations, 1907, at 3–6.

Consequently, in so far as these rulings on protection or passports discuss citizenship as such, they would not seem actually to be State Department "rulings," persuasive of the existence of a principle of compulsory election as a condition of continued American citizenship. Cf. *Miller* v. *Sinjen,* 289 Fed. 388, 394–395 (C. A. 8). And, without undertaking to determine the exact limits of the State Department's freedom to decline protection abroad to United States citizens, it is at least clear that the scope of its discretion in

this field is far more fully a matter for State Department policy than the question of citizenship, as such, could ever be. See Flournoy, 30 Yale L. Journ., *supra*, at 562–4, 709.

However, the Citizenship Board of 1906,[14] which undertook to report to Congress on the subject of citizenship, expatriation, and protection abroad, appears to have thought that there was then in American citizenship law a non-statutory principle of compulsory election applicable to dual nationals at birth. The Board appended to its Report a lengthy collection of "judicial determinations of questions of citizenship" (H. Doc. No. 326, 59th Cong., 2d Sess., pp. 43, *ff.*) which discussed (at pp. 74–76; see also pp. 79–80) the early American cases on which we have commented above at pp. 24–28, and concluded—erroneously, we think—that "there appears to be a well-established doctrine of election, which the courts have recognized; and it seems to be as well and even as frequently recognized in cases dealing with the rights of children foreign born of American parents as with the rights of children American born of foreign parentage" (p. 80). The Board seems to have based this conclusion purely

[14] The Board was appointed by Secretary of State Root, pursuant to a suggestion from the House Committee on Foreign Affairs, and consisted of Solicitor James Brown Scott, the Minister to the Netherlands, and the chief of the passport bureau of the State Department. The Act of March 2, 1907, *supra*, p. 3, was adopted on the basis of its Report.

on the cases; it did not refer to any State Department rulings.[15]

3. *After 1907*

a. *Administrative practice*

In 1907, Congress passed a statute providing that a native-born citizen would expatriate himself by being naturalized in a foreign state in conformity with its laws or by taking an oath of allegiance to any foreign state. *Supra,* p. 3. A Citizenship Board proposal for expatriation of all citizens continuing to reside abroad without sufficient excuse was rejected. *Infra,* pp. 68–77.

Even after this legislation, the State Department for some time continued to express the view that a dual national at birth, residing during minority in the country of his other nationality, was under a duty to manifest election of United States nationality by returning to the United States on attaining majority. *E. g.*, the Chief Clerk (Carr) to Consul Cheney, No. 142, Jan. 29, 1909, MS. Dept. of State, file 11428/17, III Hackworth, *Digest of International Law,* 355; cf. Flournoy, *Dual Nationality and Election* (1921) 30 Yale L. Journ. 545, 562–564. These rulings were of the same character as those rendered before 1907 (*supra,* pp. 29–32) *i. e.* rulings on demands for protection or for a passport for travel in foreign countries. See, *e. g.*,

[15] We discuss below (pp. 68–77) Congress' refusal in 1907 to enact the Board's recommended legislation which was apparently grounded in part on the view that dual nationals were and should be compelled to elect between their allegiances.

the Chief of the Consular Bureau (Hengstler) to Consul Dreyfus, Mar. 11, 1924, MS. Dept. of State, file 130 H3842, III Hackworth, at 356–357; The Second Assistant Secretary of State (Adee) to Mr. Philip Spira, Oct. 24, 1916, MS. Dept. of State, file 130 Z88, III Hackworth, at 356.

Moreover, in 1921 the Department expressly acknowleged that its prior rulings related to the right to protection:

> The Department has in numbers of instances in the past recognized the principle of election in cases of dual nationality, that is, in cases of persons born in the United States of alien parents or of persons born abroad of American parents. *Such decisions have related to the right of protection, rather than to the strictly legal title to citizenship, since there is no statute of the United States providing that a person of the class mentioned loses his American citizenship by electing the nationality of the other country concerned.* [Italics supplied.]

The Director of the Consular Service (Carr) to the Consul at Helsingfors (Davis), July 18, 1921, MS. Department of State, file P 7574, III Hackworth, at 370.

And on November 24, 1923, the State Department issued a series of instructions to American diplomatic and consular officers (quoted in *Perkins* v. *Elg*, 307 U. S. at 344–346) which in-

dicated its acceptance of the view that its rulings were limited to determining rights to protection (see 307 U. S. at 345, 346). The distinction was made more explicit in 1926, as shown in the following pronouncement, dated November 30, 1936, of the Department of State to the Consul General at London, quoted in III Hackworth, at 371:

> The Department over a number of years held in cases of persons who were born in the United States of alien parents and thus acquired American citizenship under Article XIV of the Amendments to the Constitution of the United States and likewise acquired the nationality of the state of which their parents were citizens or subjects under its laws that, if such persons were taken abroad during their minority and resided in the country of which their parents were nationals, they were required to demonstrate their election of the nationality of the United States after attaining majority or otherwise were held not to be entitled to recognition as citizens of the United States. However, in 1926, the Department reconsidered the whole subject of election of nationality by persons having a dual nationality status and concluded that in the absence of legislative authority it was not warranted in declining to accord recognition as citizens of the United States to persons who were born in the United States of alien parents merely because they have resided abroad

> for protracted periods before and after attaining majority. Nevertheless, with respect to the matter of protection the Department considers the period of residence abroad of a person having dual nationality before and after attaining majority. If the period of foreign residence in the country of which he is also a national has been of long duration, it has been its practice to decline to issue passports save under exceptional circumstance.[16]

After 1926, when dual nationals residing abroad inquired as to how they could renounce their American citizenship, the Department of State would customarily inform them that it was necessary that they expatriate themselves by one of the statutory acts set out in Section 2 of the Act of March 2, 1907 (*supra*, p. 3). For instance, dual nationals were informed that expatriation would not result merely by reason of an affidavit of intention to reside permanently in Great Britain and not to preserve the party's allegiance to the United States; that one of the two statutory acts of expatriation was required of a 27-year-old Frenchman who was also American by birth, even though an oath of allegiance to France, as defined in the 1907 Act, was unknown to French law; and that a person born in the United States of Danish

[16] See also, to the same effect, Dept. of State to Consul at Calgary, Mar. 2, 1935, MS. Dept. of State file 130/1585, III Hackworth, at 357; Nielsen (then Solicitor of the State Department), *Some Vexatious Questions Relating to Nationality* (1920) 20 Col. L. Rev. 840, 854.

parents who obtained an official Danish certificate for the purpose of retaining Danish nationality would not thereby expatriate himself." See III Hackworth, at 373–374. We know of no instance after 1926 in which the doctrine of election-at-majority was applied by the Department of State to a dual national at birth on the issue of citizenship.[17]

A similar position to that taken by the Department of State in the 1920's was asserted by the Board of Immigration Appeals. *In the Matter of R*, 1 Dec. Immigration and Nationality Laws 389, involved a woman, born in the United States in 1873 of German parents, who was taken to Germany three years later and who did not attempt to return until 1943. The Board overruled the argument that she was expatriated by

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[17] In a letter to the Department of Justice, dated August 31, 1951, on the District Court decision in *Tomasicchio* v. *Acheson*, 98 F. Supp. 166 (D. D. C.), holding contrary to the court below on the principle of compulsory election (see fn. 3, *supra*, p. 16; R. 32), the Chief of the Passport Division of the State Department wrote:

"The Court's opinion that there has been no statutory provision, and that there is no such provision now, requiring election in any form on the part of a person *who has possessed dual nationality since birth* or providing for expatriation on the part of such a person because of failure to elect citizenship of the United States within a reasonable time after attaining majority is consistent with the position which has been followed by this Department since 1926. (See Hackworth, Digest of International Law (1942), V. III, pages 369, 374." (Emphasis in original.)

See also II Hyde, *International Law Chiefly as Interpreted and Applied in the United States* (2d ed. 1945), pp. 1136–7.

failing to make an election after attaining her majority, stating (at p. 392):

> * * * It has not been recognized by the Immigration and Naturalization Service or by this Board that a native-born child having dual citizenship must elect between two citizenships upon attaining his majority; it has not been recognized by the courts; and the statements of authorities to this effect are subject to question insofar as they are based upon State Department rulings, which are determinative of the right to protection and not of citizenship, as such.[18]

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[18] Charles Cheney Hyde offers an explanation of the early State Department rulings and a review of the Department's correction of its error. See II Hyde, *International Law Chiefly as Interpreted and Applied in the United States* (2d ed. 1945), 1170–1172:

"The Executive Department has long been of opinion that the native American national or citizen who makes his permanent home within the territory of a foreign State may, under certain circumstances, cease to be entitled to the protection of the United States. It had been intimated by Chief Justice Marshall in 1804, that until such an individual expatriated himself, he was entitled to the protection of his own country. [*Murray* v. *The Charming Betsy*, 2 Cranch 64, 120.] Possibly, therefore, in order to justify the withholding of protection, the Department of State in earlier days announced that the taking up of a permanent abode in a foreign land produced expatriation. No act of Congress, however, proclaimed such a rule, and none ever has.

"Gradually it came to be understood that a native American citizen might forfeit in a domestic sense, the privilege of claiming the protection of the United States without losing also his national character, and that so long as he did not formally renounce his allegiance or become naturalized

See also L. L. Nettleton [a member of the Board of Immigration Appeals], *Loss of Citizenship in the United States*, Imm. and Natur. Service Monthly Review, Vol. 1, No. 6, Dec. 1943, p. 6 ("The requirement to elect does not apply to persons possessing dual nationality from birth"). *Cf. In the Matter of S*, 1 I. & N. Dec. 476 (1943).

These rulings indicate that if at any time after reaching his majority in 1928, petitioner had inquired of agents of this Government whether his continued residence in Italy would prejudice later efforts to come to the United States, he would have been told that it would not. This means, of course, that a determination now that there was a duty of election will run counter both to an administrative position of at least 26 years' standing and to what petitioner and others in like position might have been told was the firm position of the United States Government. In these circumstances it seems to us unfair, as well as legally difficult, to hold that there was a firmly established doctrine of compulsory election in 1928 or thereafter.

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abroad, it was both unwise and unnecessary to regard him as having forfeited his citizenship by reason of his protracted residence within the territory of a foreign State. Thus Secretary Hay, in circular instructions issued in 1899, declared that 'even where expatriation may not be established, a person who is permanently resident and domiciled outside the United States cannot receive a passport.'"

b. *Judicial decisions*

Though there are several expressions which have a bearing on the problem, we do not believe that judicial decisions since 1907 have made the doctrine of compulsory election a part of our law.

(i). The German-American Mixed Claims Commission held, after World War I, that a native American citizen of British parentage did not, under American law, elect British nationality merely because he continued to reside, after attaining 21, in England and in Canada where he had been taken as a minor. *William Mackenzie, et al.* (*United States* v. *Germany*), agreement of August 10, 1922, Mixed Claims Commission, *Decisions and Opinions,* 628–632 (opinion of Umpire Parker), III Hackworth, at 370–1.[19] *Leong Kwai Yin* v. *United States,* 31 F. 2d 738 (C. A. 9), held, in 1929, that the Act of March 2, 1907, *supra,* p. 3, provided the exclusive means of expatriation of a native-born American citizen, so that mere foreign residence for three years after majority did not affect expatriation. This was tantamount to denying the existence of the principle of compulsory election. And a 1950 opinion by the court below (*Petro* v. *McGrath,* 188 F. 2d 978, 979 (C. A. D. C.)) states, with respect to long continued foreign residence before

[19] Flournoy, *Dual Nationality and Election* (1921) 30 Yale L. J. 545, 693–694, cites two earlier arbitral decisions of other tribunals which appear to have recognized the principle of compulsory election, and another which rejected it.

1940 by a dual national after majority, that "that cannot be considered a ground for voluntary expatriation since no statute so provided" at that time. This, too, seems to reject a general principle of compulsory election for dual nationals.

(ii). On the other hand, *State ex rel. Phelps* v. *Jackson*, 79 Vt. 504, 520–1 (1907), explicitly adopted, by way of an extended dictum, the principle of compulsory election for foreign-born children of American citizens. The case did not involve an American-born dual national and the court did not comment on that situation. Because the 14th Amendment applies to the latter but not the former group, there could very well be a difference in the applicability of the election principle to the two cases. See also *Ex parte Gilroy*, 257 Fed. 110, 124–5 (S. D. N. Y.).

In *United States* v. *Husband*, 6 F. 2d 957, 958, the Second Circuit, without grounding decision on the point, "suggested" that a doctrine of compulsory election was probably applicable to native-born Americans taken to reside abroad during their minority. The court appeared to think "mere residence" abroad after 21 insufficient, but that election could be evidenced by residence plus overt acts (*e. g.*, service in the army, taking oath of allegiance, using foreign passport) indicating continued allegiance to the other sovereign. *United States ex rel. Rojak* v. *Marshall*, 34 F. 2d 219, 220 (W. D. Pa.) follows the *Husband* opinion, as an alternative ground of deci-

sion, in appearing to recognize a doctrine of compulsory election. *Doyle* v. *Ries*, 208 Minn. 321, 293 N. W. 614, states broadly, by way of dictum which it rests on the *Elg* case, that dual nationals residing abroad are required to elect at majority.[20]

(iii). Along with some others,[21] the court below thought that, regardless of what prior views may have been, the language of *Perkins* v. *Elg*, 307 U. S. 325, did incorporate into American nationality law the general principle of compulsory election for all dual nationals (R. 31–2). We have shown above in Point I (*supra*, pp. 18–21) that neither the broad nor the narrow *holding* of the case, nor its basic theory, involves the principle of compulsory election for a dual national at birth, like petitioner. But some language in the opinion can certainly be read as

[20] After the decision below, the District of Columbia Circuit followed it in a case which could have been decided on the basis of *Perkins* v. *Elg*, 307 U. S. 325, and Section 401 (a) of the Nationality Act of 1940, since it involved an American girl born and continuing to reside in Italy, who acquired Italian citizenship after birth through her father's resumption of Italian nationality. *Segreti* v. *Acheson*, 195 F. 2d 205, decided March 20, 1952. Two district courts have cited the rule of the opinion below, both by way of dictum. *Mazza* v. *Acheson*, 104 F. Supp. 157 (N. D. Calif., April 21, 1952) (plaintiff held expatriated under 1907 Act by taking oath of allegiance), and *Mastrocola* v. *Acheson*, 105 F. Supp. 580 (S. D. N. Y., June 17, 1952) (a *Perkins* v. *Elg* situation).

[21] See Sandifer, *The Elg Case: Election of Citizenship at Majority of Minors*, (1940) 14 U. of Cin. L. Rev. 423, 432–3, 441; *Doyle* v. *Ries*, 208 Minn. 321, 324–5, 293 N. W. 614, 616–7.

endorsing a sweeping doctrine of compulsory election at majority. We believe, however, that in their context and in relation to the basic theory of the opinion these excerpts do not go as far as has been claimed.

In the "Second" section of the opinion, the Court stated, at the outset, and generally (307 U. S. at 329):

> It has long been a recognized principle in this country that if a child born here is taken during minority to the country of his parents' origin, *where his parents resume their former allegiance,* he does not thereby lose his citizenship in the United States provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties. [Emphasis added.]

The italicized phrase at once distinguishes the case from this one, because, unlike Miss Elg's parents, petitioner's never acquired American or lost Italian citizenship, and therefore, again unlike the Elgs, they did not go through the process of reacquiring their native nationality—of being in effect naturalized abroad.

But the Court immediately after making this statement discussed, as illustrative of the principle, five administrative rulings which should be considered in some detail. Two of them pose only the problem of the *Elg* case. They do not involve dual nationals at birth; rather, they deal

with American born children of foreign parents who were naturalized in the United States at the times of the births of the children but who subsequently reassumed their original residences and allegiances, taking their children with them. The *right* of the children to elect American citizenship at adulthood is maintained. *Steinkauler's Case,* 15 Op. A. G. 15; Mr. Bayard, Secretary of State to Mr. de Weckherlin, April 7, 1888, Foreign Relations, 1888, II, p. 1341, III Moore, *Digest of International Law,* at 542.

The remaining three rulings outlined by *Elg* do, in fact, seem to involve dual nationals at birth, who, like petitioner, were taken by their foreign born parents to the lands of their parents' birth. Mr. Bacon, Secretary of State, to the German Ambassador, Nov. 20, 1906, I Foreign Relations, 1906, p. 657; Mr. Evarts, Secretary of State, to Mr. Cramer, No. 337, Nov. 12, 1880, III Moore, at pp. 544–545; Mr. Evarts, Secretary of State, to Mr. White, Minister to Germany, June 6, 1879, III Moore, at 543–544. In one of these, the Bacon ruling, it was stated that an election "must" be made. In the others, the two Evarts rulings, it was stated that there was a "right" to make such an election; and that it was unimportant whether the putative citizens' fathers were naturalized citizens or not at the times of their births. See

Perkins v. *Elg*, 307 U. S. at 333, 332, respectively.[22] In sum, only one ruling is phrased in terms of a *duty* of election.

It seems to have been concluded below (R. 32) that the opening statement of principle (*supra*, p. 43), and the collection of rulings, afford basis for the decision that dual citizens, of whatever sort, *must* elect American citizenship at majority, or lose it. And it is certainly true that, for purposes of its review in *Perkins* v. *Elg*, this Court did not think it necessary to discuss any distinctions between dual nationals at birth and those who later became dual nationals, or between the "right" and the "duty" of election.

Nevertheless, it should be noted that, after reviewing these departmental rulings, the Court concludes with the language we have already noted (*supra*, pp. 20–21) that the rulings "leave no doubt of the controlling principle long recognized by this Government," (307 U. S. at 333) which principle, "while administratively applied, cannot properly be regarded as a departmental creation independently of the law. It was deemed to be a necessary consequence of the constitutional provision by which persons born within the United States and subject to its jurisdiction be-

[22] Moreover, the two Evarts rulings involved persons who had, like Miss Elg, already made an affirmative election of United States citizenship. They were, in consequence of the rulings, protected from military service abroad. The *Steinkauler* ruling also involves merely a question of protection from military service during minority.

come citizens of the United States. To cause a loss of that citizenship in the absence of a treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of binding choice." 307 U. S. at 334.

This language may be read to refer to the "controlling principle" of compulsory election. But coming as it does after the review of the departmental rulings, it seems to us rather to show that the underlying principle of importance was not the duty of election. The "controlling principle" was that a minor could not be bound while he was a minor. He had a *right* to make an election at adulthood because he could not possibly be bound earlier.

This requirement of voluntary action, consistent with a traditional and familiar view of the domestic law of this country, found substantial, though inexplicit, support in the departmental rulings quoted, and it was, it seems to us, for their endorsement of this view that those rulings were collected. Compare Opinion, Legal Branch, Immigration and Naturalization Service, Aug. 4, 1941, file No. 23/50490, cited in Roche, *The Loss of American Nationality—The Development of Statutory Expatriation,* (1950) 99 U. of Pa. L. Rev. 25, 27 (which applies the "voluntary" principle of *Elg* to hold that a blanket edict conferring citizenship on all persons living in a particular

foreign state did not automatically expatriate all Americans affected thereby, and that it would affect them only when they voluntarily accepted it); see also *United States ex rel. Baglivo* v. *Day*, 28 F. 2d 44 (S. D. N. Y.).

This view of the "Second" portion of the *Elg* opinion is supported by and consistent with the balance of the opinion. In the "Third" and "Fourth" sections, the Court considers the effect of the Swedish-American treaty of 1869, regulating citizenship questions between the two countries, and the Act of March 2, 1907 (*supra*, p. 3), providing for expatriation. Under both, it concludes that there can be no expatriation without voluntary action, and no requisite voluntary action during minority. Thus, in saying that "Having regard to the plain purpose of § 2 of the Act of 1907, to deal with voluntary expatriation, we are of the opinion that its provisions do not affect the *right* of election, which would otherwise exist, by reason of a wholly involuntary and merely derivative naturalization in another country during minority" (307 U. S. at 347, italics supplied), the Court was not undertaking any broad endorsement of a principle of compulsory election. It was again emphasizing that there could not be a loss of constitutionally conferred citizenship, consistent with traditional principles of domestic American law, without voluntary action, and voluntary action could not occur during minority.

The same may be said of the Court's observation that "* * * if it be assumed that a child born in the United States would be deemed to acquire the Swedish citizenship of his parents through their return to Sweden and resumption of citizenship there, still nothing is said in the treaty which in such a case would destroy the *right* of election which appropriately belongs to the child on attaining majority" (307 U. S. at 337, italics supplied).

It is to be remembered in dealing with the Court's references to a "right of election" that those words are a description of a fact of avowal or disavowal of something done by or for a minor, in many different situations, as well as a shorthand way of stating the particular principle on which *Elg* relied. The fact that this Court described Elg's choice to return to the United States as an "election" does not mean that it intended to comprehend everything that also might be described as an election or to put different situations under the same rubric.[23]

[23] In this connection, it is important to note the grounds on which the Government urged that Miss Elg had expatriated herself. The Government's brief argued that Miss Elg had acquired Swedish citizenship through her father's resumption of that nationality, and that she thereby lost her American citizenship, for two reasons: (a) because of the terms of the pertinent Swedish-American treaty and (b) because she had been "naturalized" in Sweden and therefore fell under the specific terms of the Act of March 2, 1907, *supra*, p. 3. The short of the Court's answer was that neither treaty nor

So far as the early State Department rulings cited in *Elg* stated principles which went further than the simple domestic principle that a minor cannot be bound by acts done for him during minority, the Court did not endorse them implicitly, either in its holding or in any analysis necessary to its holding, and it certainly did not endorse them explicitly.[24] Whatever broad endorsement is read into the opinion would be the plainest kind of dictum. See *Miller* v. *Sinjen*, 289 Fed. 388, 394–395 (C. A. 8) (pointing out limitations on the usefulness of State Department rulings). And while it is true that the Court, at p. 334, did seem to equate the "right of expatriation" of a child born in this country "who may be" with one who "may become" subject to dual nationality, this comment, if interpreted as broadly as it was by the court below (R. 32), was, equally with any broad indorsement of the administrative principle of compulsory election, a plain *obiter dictum*, for the problem of dual nationals at birth was not before the Court. Cf. *Hum-*

statute applied to her during her minority, and that her return to this country at majority constituted an "election" of American nationality which ended any possibility that either treaty or statute could apply to her thereafter.

[24] In the "Fourth" section of the opinion, the Court even quotes at length from a 1923 State Department circular indicating administrative acceptance of the position that the earlier rulings on dual nationals at birth were restricted to determining rights to protection (307 U. S., at 345–346; see *supra*, pp. 34–35).

phrey's Executor v. *United States*, 295 U. S. 602, 626–627; *Cohens* v. *Virginia*, 6 Wheat. 264, 399.[25]

We do not believe that, in casually equating the *right* of election of those who are born dual nationals and those who acquire a second nationality after birth, this Court thought that it was passing on the important questions of whether the methods of expatriation specified in the 1907 Act are exclusive, a point which is discussed below (pp. 68 ff.), or of whether there is a *duty* of election imposed on those who are dual nationals from birth. The Court simply was not addressing itself to those problems. As we note above (p. 21), the *Elg* case was concerned with ways in which citizenship may *not* be lost, rather than the converse. The equation of the position of dual

[25] As the *Elg* opinion undertakes to discuss neither the shift of State Department view in the 1920's, nor the distinction made more explicit by that shift between the right to diplomatic protection and citizenship, it particularly does not appear sound to rely on any emanations from its language about an "election." The Court does not seem to have had the State Department's clarification of views in the 1920's called to its attention, probably because that shift was not pertinent to the specific issue before it.

It is also relevant to note that, so far as dual nationals like Miss Elg were concerned, the State Department and the Department of Justice maintained a different rule, even after the 1920's, from the position taken with respect to dual nationals from birth. The administrative view was that native born Americans naturalized abroad during minority automatically and finally lost their American nationality. See *Perkins* v. *Elg*, 307 U. S. at 347–349; fn. 17, 23, *supra*.

nationals at birth with those who acquire dual nationality during minority is sound in relation to the central problem which was before the Court, *i. e.*, whether a minor could be deprived of the *right* to elect American citizenship at majority. It does not follow that such equation is sound in all other contexts.

At most, the opinion suggests that a dual national *may* make an election of foreign nationality at majority inconsistent with a further claim of American citizenship. This is not the same as saying that an election of American nationality *must* be made. For the existence of a right of election at majority does not call up, as a necessary corollary, a duty of election. Although the dual national may be content to live out his life as a citizen of both countries, he may also, on reaching 21, desire to choose one nationality and put off the other, *i. e.*, exercise the *right* of election. For instance, in order to obtain the full protection of the United States as against the country of his other nationality, it may be desirable for the dual citizen to elect to be solely an American, or *vice versa*. But the fact that he can make this election, if he wishes, does not prove that he must do so. See Roche, *The Loss of American Nationality—The Development of Statutory Expatriation* (1950), 99 U. Pa. L. Rev. 25, 32.

B. *There is no substantial support for the view that there is a rule or principle of international law imposing a duty of election in this case, which this Court, as a matter of domestic law, should apply*

The principle of compulsory election by dual nationals has sometimes been stated as if it were a rule of, or had its source in, international law. See III Moore, *A Digest of International Law*, 518; Borchard, *The Diplomatic Protection of Citizens Abroad*, Sec. 259. And it is clear that some of the rules which are called rules of international law are properly a part of our domestic law, enforceable without reference to statute by this Court. See *The Nereide*, 9 Cranch. 388, 423 (where Marshall, Ch. J., states that the Court, until an act of Congress is passed, "is bound by the law of nations, which is a part of the law of the land"); *The Charming Betsy*, 2 Cranch. 64, 118 ("* * * an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains * * *"); *The Pacquete Habana*, 175 U. S. 677, 700 ("International law is part of our law, and must be ascertained and administered by the courts * * * as often as questions of right depending upon it are duly presented for their determination."); Fenwick, *International Law* (3d. ed., 1948) 91–92.

However, there is impressive testimony from text-writers that there is no such rule of international law as was relied on below. Van Dyne, *Citi-*

zenship of the United States (1904), p. 25; Flournoy, *The Need for Amending Existing Citizenship Laws* (1932), 1 Fed. Bar J. (No. 2) 18, 55; Flournoy, *Dual Nationality and Election* (1921), 30 Yale L. Journ. 545, 559–560, 697; Sandifer, *The Elg Case; Election of Citizenship at Majority by Minors* (1940), 14 U. Cin. L. Rev. 423, 433, 442. And if no general rule of international understanding exists, it seems difficult to justify its initial formulation by this Court as an inherent common law domestic rule of citizenship, especially since the question would seem to be one for Congress (see *infra*, pp. 62–64). Cf. Flournoy, *International Problems in Respect to Nationality by Birth*, 1926 Proceedings, American Society of International Law, 59, 62; Nielsen, *Some Vexatious Questions Relating to Nationality* (1920), 20 Col. L. Rev. 840.

The principal support for the argument that the principle of compulsory election by dual nationals has footing as a rule of international law is the alleged existence of such a principle in the municipal law of a large number of countries. See, *e. g.*, Borchard, *Diplomatic Protection of Citizens Abroad*, Sec. 259.[26] It is true that a

[26] Borchard also states that the principle of election "is based upon the fact that when a person becomes *sui juris* he cannot logically retain two nationalities, and he is required to elect between them in order that he may be bound exclusively by the one or the other." But, very recently, this Court pointed out that dual nationality is "a status long recognized in the law. * * * The concept of dual citizenship

number of such laws have contained provisions with respect to elections of citizenship, but the existence of such provisions does not support a rule of international law because the election provisions involved operate too differently, and are premised on views of citizenship too varied, to illustrate any basic principle:[27]

(1) By virtue of the French Nationality Code of 1899, the following was true: Those born in France of alien parents were French if they were domiciled in France on reaching majority. It was stated by the French chargé d'affaires, however, that as a practical matter, the French authorities always assumed such domicile. Persons born in France of alien parents could decline

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recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that he asserts the rights of one citizenship does not without more mean that he renounces the other. * * * * [Dual citizenship] could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other." *Kawakita* v. *United States*, 343 U. S. 717, 723–725.

[27] We choose nine nations which Borchard states recognize a right of election of nationality as to native born children born of foreign parents. As the laws of those countries are collected in the Citizenship Board of 1906 Report (*supra*, p. 32), we have used the laws as they stood at that time. For the purposes of determining the existence of the principle of compulsory election, this is a particularly useful date, since it was just before the United States passed comprehensive legislation with respect to nationality problems. See also the collection of laws referred to, and comments made by, Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, (1935) 29 Am. Journ. of Int. Law, 248, 259–261.

French nationality, provided that during the year following their majority, they produced (1) a certificate of the government of the country to which they belonged supporting their claim of nationality in that country, and (2) another certificate from the same government stating that they had satisfied their military obligations in that country, and provided further, that they had discharged all their military obligations to France. H. Doc. No. 326, 59th Cong., 2d sess., 315–316.

(2) The following provisions were in the Spanish Civil Code:

ARTICLE 17. The following are Spaniards:

1. Persons born in Spanish territory.

* * * * *

ARTICLE 18. Children, while they remain under the parental power * * *, have the nationality of their parents.

In order that those born of foreign parents in Spanish territory may enjoy the benefits granted to them by No. 1 of art. 17 it shall be an indispensable requisite that the parents declare, in the manner [designated] * * * that they choose, in the name of their children, Spanish nationality, renouncing any other.

ARTICLE 19. Children of a foreigner born in Spanish dominion should declare, within the year following their majority or emancipation, if they desire to enjoy the quality of Spaniards which art. 17 concedes to them.

> * * * those who reside in a foreign land [shall make this declaration] before one of the consular or diplomatic agents of the Spanish Government * * *. [H. Doc. No. 326, 59th Cong., 2d sess., 509–511.]

(3) The law of Belgium was that every person born in Belgium of a foreigner might claim Belgian nationality within a year following the attainment of his majority provided that if he resided in a foreign country, he should file a petition to establish his domicile in Belgium, and settle there within a year after the date of the filing of the petition. H. Doc. No. 326, 59th Cong., 2d sess., 280–281.

(4) The Greek Civil Code seems to have recognized a principle of election only with respect to children born to parents who have subsequently become naturalized Greeks, and to persons who were Greek and had renounced Greek nationality, if such children were minors at the time of these events, provided that within a year after their majority, these persons made a declaration of their desire to acquire Greek nationality, reside in Greece, and take the oath of a Greek. H. Doc. No. 326, 59th Cong., 2d sess., 427–428.

(5) The Italian Civil Code stated a number of situations in which "election" might be made of Italian or foreign nationality. With respect to children born in Italy of foreign parents, it distinguished between those who had had an uninterrupted Italian domicile and those who had not,

With respect to those who had not, it provided that they might elect citizenship provided they made a declaration to this effect, if they were in a foreign land, before an Italian diplomatic or consular officer, and established domicile in Italy within a year after making this declaration. H. Doc. No. 326, 59th Cong., 2d sess., 440–444.

(6) The Portuguese Civil Code provided that those who were born in Portugal of a foreign father, who was not at the time in the service of his country, were Portuguese citizens, unless they declared for themselves after becoming of age, or through their parents or guardians during minority, that they did not wish to become Portuguese citizens. H. Doc. No. 326, 59th Cong., 2d sess., 486.

(7) The only Mexican provision incorporating a principle of election, stated that the following were Mexicans:

> III. Foreigners who acquire real estate in the Republic, or have Mexican children, provided they do not declare their intention to retain their nationality. [H. Doc. No. 326, 59th Cong., 2d sess., 450.]

(8) The Costa Rican Constitution provided that native Costa Ricans included "The children of a foreign father or mother born in the territory of the Republic who, after having reached the age of twenty-one years, register themselves as Costa Ricans, or were registered as such by their parents before reaching that age." H. Doc. No. 326, 59th Cong., 2d sess., pp. 294–298.

(9) Although the Constitution of Chile provided that all those born in the territory of Chile are Chileans, and although there are no stated exceptions or provisions for election [see H. Doc. No. 326, 59th Cong., 2d sess., 290–291], a decision of the Court of Appeals at Santiago supports the principle of election. See I Foreign Relations, 1907, 124–125. It appears that the case involved a claim by a Chilean born of Spanish parents who was appealing from a conviction for having failed to register for military service. The court stated:

> * * * That although the fundamental statute in article 6, No. 1, declares that "persons born in the territory of Chile are Chileans," such disposition, by its nature, must be interpreted in conformity to the rules of international law, inasmuch as conflicts may occur between it and that which is established on the subject in the constitutions, as occurs at present, in that the Spanish constitution recognizes as Spaniards, among others, "the sons of Spanish father or mother, although they be born outside of Spain;" * * * That it is a principle uniformly admitted by the text writers of that science that the unemancipated son follows the nationality of the father * * *
>
> * * * That it is gathered from what has been expounded that the constitutional provision of article 6 should not be considered as being absolute in character, but

limited in the sense that it offers Chilean nationality "to those that, possessing the qualifications there enumerated, are freely willing to accept it, where, at the same time, they are offered the nationality of another country by the legislation in force in the latter;" and * * * That [the defendant's] nationality as a Spanish subject [having been established], the provisions of * * * law * * * [pursuant to which he was prosecuted are inapplicable against him.]

* * * * *

It is obvious that the statutory provisions collected above do not reflect any kind of uniform pattern. Thus, in France and Portugal, it is necessary to take affirmative steps to decline citizenship, whereas it would appear that in the other countries it is necessary to take affirmative steps to retain it. Therefore, in France and Portugal at least, there cannot be said to be any rule of domestic law that there is a duty on dual nationals at birth to elect the nationality of the country of their birth, or lose it. In France, also, there is a concern with military responsibility, both to France and to the other nation involved, which is not expressed in the other statutes.

In Greece, the right to elect is limited to those whose parents during the child's minority have acquired or lost Greek citizenship. In Mexico,

the only provisions available indicate that there is no election at all for persons who are dual nationals as birth. In some of the nations, residence is required (*e. g.*, Greece); in others, domicile (*e. g.*, Belgium); in still others, no mention is made of the subject (*e. g.*, Portugal). In some, as in Italy, there is a gamut of provisions permitting election in a variety of situations, while in most of the states, the right is relatively limited. In Spain and Costa Rica, the affirmation may be made by the parent of the child. In Spain, the parental affirmation seems to be a condition precedent to the child's later affirmation, whereas in Costa Rica this does not seem to be the case.

It seems to us that this collection of *statutory* expressions of the general principle of election shows that there is no underlying principle which can be used to conclude that the rule applied below is a rule of international law. Each of the provisions noted operates somewhat differently, and undoubtedly in the context of a far different body of laws.

Moreover, these differences in the statutes reflect more than the accidental form of the legislation of which they are a part. They also reflect different attitudes about what relationship should exist between citizens and the state, between individuals and the organized collectivities of individuals with which they have ties. If a nation, as Spain, requires that native-born children of aliens, in order at majority to be free to choose

Spanish citizenship, must have had their parents take affirmative steps for them during childhood, then that nation is saying that, for it, citizenship is more merely then a matter of local birth, although it is, to be sure, less than the relationship between citizen and state required by nations which rely solely on a principle of citizenship by blood.[28] Although domestic rules of citizenship are in a sense responses to international problems, there is very little evidence that they have been framed with a view to international amity. Rather, the evidence is far stronger than many were framed with a view to the dangers of international disharmony, and to help either to assure adequate manpower for armies, or as part of a psychological program of nationalism. See Fenwick, *International Law* (3d ed. 1948), 259–260. Consequently, this is not the kind of situation which would normally give rise to an unwritten rule of international law immediately applicable by courts. Cf. *The Pacquete Habana,* 175 U. S. 677, 700; *The Nereide,* 9 Cranch 388, 421–423. The differences in premises about the nature of citizenship suffuse the statutes on election, and foreclose the existence of any simple principle of

[28] Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality,* (1935) 29 Am. Journ. of Int. Law 248, 259–260, states that of 33 nations which provide a method for terminating ~~final~~ local nationality, 22 are countries whose laws are based principally on the principle of citizenship by virtue of the citizenship of the parents. And of the 10 whose laws are based principally on the principle of the citizenship by virtue of the place of birth, 7 were part of the British Empire.

international law respecting election between nationalities.

C. The recognition or enactment of a principle of compulsory election by dual nationals is a legislative function.

As noted above (*supra* pp. 54–62), the expression of the principle of election by dual nationals is for the most part statutory. This is some indication that, all over the world governments and courts have felt that the formulation of such a principle, and its exact scope, is essentially a legislative policy matter.

There is support for this view in a decision of this Court upholding a Congressional enactment on expatriation on the ground that the subject was essentially one bearing on international relationships. Thus, in *Mackenzie* v. *Hare*, 239 U. S. 299, 308–312, this Court upheld the provision of the 1907 Act that an American woman who married a foreigner lost her American citizenship. It was obvious that the woman did not intend to expatriate herself, and that she did not think her conduct reflected a lesser allegiance to the United States. But this Court held that so long as the circumstance chosen was reasonable, the Congress could determine that a citizen loses his citizenship when he voluntraily does the necessary act. See *Ex parte Griffin*, 237 Fed. 445, 453 (N. D. N. Y.). We may assume that this ruling does not permit Congress to refuse to recognize as expatriation acts such as naturalization abroad (*Talbot* v. *Jan-*

sen, 3 Dall. 133; *Chas. Green's Son* v. *Salas,* 31 Fed. 106 (C. C. S. D. Ga.)), or swearing allegiance to another nation with intent to renounce American nationality (cf. *Juando* v. *Taylor,* Fed. Cas. No. 7,558 (S. D. N. Y.); *United States (ex rel. Fracassi* v. *Karnuth,* 19 F. Supp. 581, 533 (W. D. N. Y.)),[29] and it plainly would not permit Congress to provide that a tourist's visit to another nation would expatriate. But the *Mackenzie* case does emphasize that, for equivocal acts, congressional judgment is binding, for the reason that it is for Congress and not the courts to adjust problems of citizenship as they affect international relationships. Cf. *Savorgnan* v. *United States,* 338 U. S. 491, 497–498. See also, *Talbot* v. *Jansen,* 3 Dall. 133, 163; *United States ex rel. Wrona* v. *Karnuth,* 14 F. Supp. 770, 771 (W. D. N. Y.); *Petition of Peterson,* 33 F. Supp. 615, 616 (E. D. Wash.); *Ex parte Fung Sing,* 6 F. 2d 670 (W. D. Wash.); cf. Roche, *The Loss of American Nationality—The Development Statutory Expatriation,* (1950) 99 U. Pa. L. Rev. 25–27.[30]

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[29] Although even this may be limited in situations where the safety of the state requires it. The 1907 Act proscribes any expatriation in time of war. This has never been successfully challenged.

[30] It is of course not inconsistent to say (1) that the various national domestic sources of a supposed rule are of so varied a nature as to preclude it from being considered a rule of international law, and at the same time to say (2) that, in terms of a domestic allocation of functions, the adoption and formulation of the rule have international implications.

We deal here, too, with citizenship conferred "not by gift of Congress, but by force of the Constitution of the United States (Fourteenth Amendment)." *Dos Reis* v. *Nicolls*, 161 F. 2d 860, 862 (C. A. 1). In 1939, in its brief in *Perkins* v. *Elg*, the Government commented: "It has never been settled whether or not the courts or the executive departments may enunciate doctrines prescribing conditions of termination of the citizenship declared by the Constitution when such conditions are not set out in any treaty or statute." Brief for the Petitioners, No. 454, October Term, 1939, p. 48. That is still true today. But whether or not the Court would ever feel free to find expatriation in acts outside of those declared in treaty or statute, we think that it would be inappropriate for the Court now to establish a principle of compulsory election for a native-born citizen. Congress has legislated for the future on the precise point in the recent Immigration and Nationality Act of 1952, in a detailed way which a court could not emulate. *Infra*, pp. 88–93. There is, accordingly, little or no occasion for the Court to formulate rules of election which could have effect only for past periods.

The essence of this survey of the judicial and administrative treatment of the so-called principle of compulsory election is that it never became incorporated into our law of nationality. Whatever tentative recognition may have been given to it by the State Department and some

publicists was definitively disavowed some years before petitioner came of age in 1928. The sparse judicial acceptance of the principle, mostly based on the early State Department rulings, has been equally tentative and tenuous and has been counterbalanced by judicial rejection of the principle. This Court has not affirmed the principle for dual nationals at birth.

We think that the state of American law before the recent 1952 statute has been correctly described by R. W. Flournoy, long time member of the State Department's legal office, acknowledged expert on nationality law, and ardent supporter of the adoption, through statute or treaty, of the principle of compulsory election. In 1932, he said (*The Need of Amending Existing Citizenship Laws*, 1 Fed. Bar J., No. 2, March 1932, 18, 55):

> Thus, as the law now stands, a person born in the United States of Italian or Chinese parents temporarily visiting this country, may be taken immediately after birth to the country of his parents' nationality and remain there the rest of his natural life without losing his American nationality, acquired at birth.[31]

[31] In 1940, before the House Committee on Immigration and Naturalization which was considering the proposed Nationality Code, Mr. Flournoy emphatically took the same view. See *infra*, p. 84. And in 1941, after the passage of the Nationality Act of 1940, he deplored that the new Act "contains no provision for automatic termination of American nationality in cases of persons having also the nation-

III. THE STATUTORY ENACTMENTS ON EXPATRIATION PRECLUDE APPLICATION OF ANY PRINCIPLE OF COMPULSORY ELECTION

We believe that whatever foundation, in necessity or otherwise, there may have been for recognizing the duty of election by dual nationals at birth in the period before 1868, when our Constitution did not define citizenship and Congress failed to legislate on the subject of expatriation, or in the period between 1868 and 1907, when Congress merely recognized generally the right of expatriation without specifying the grounds therefor, no such basis existed after enactment of the Act of March 2, 1907, *supra*, p. 3, by which Congress first undertook to define the conditions for expatriation. Even if it is assumed that the principle of loss of citizenship by failure to elect is somehow different from the principles of expatriation, the presence and history of the Act are relevant in determining the existence or continued force of a broad common-law principle of compulsory election. If there had been any such principle, it may well be that its enforcement by this Court would be justified only so long as

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ality of foreign states and residing for protracted periods, after attainment of majority, in the territories of such states." (*The Nationality Act of 1940*, New York University School of Law, Contemporary Law Pamphlets, Series 5, No. 4 (1941) p. 10, quoted in *Tomasicchio* v. *Acheson*, 98 F. Supp. 166, 170 (D. D. C.). In 1949, Mr. Flournoy expressed the same view. *Fundamental Principles Relating to Ascertainment of Nationality* (1949), 10 Fed. Bar J. 275, 281–2.

Congress had not spoken on the subject, or in the general field of the subject. Compare, *The Nereide,* 9 Cranch 388, 421–423; *Mackenzie* v. *Hare,* 239 U. S. 299; *Comitis* v. *Parkerson,* 56 Fed. 556, 559, 563 (C. C. E. D. La.). In any case, while there is room for difference of opinion with regard to the scope of the 1907 Act, we have reached the conclusion, from its particular history and terms, that this statutory enactment on the subject of expatriation must be deemed to have stated the exclusive manner in which citizenship conferred by the Constitution might be lost from 1907 to 1940 and that, at the least, it precluded application of a doctrine of election to petitioner.

For this case, the 1907 Act is the significant statute, for if petitioner were under a duty to evince his election to retain United States nationality by returning to this country after reaching majority, he was under a duty so to act within a reasonable time after 1928, when he became 21, long before the nationality laws were revised in 1940. However, we are also of the view that the Nationality Act of 1940, if it should be thought relevant, provided the exclusive means of loss of citizenship after it became effective in January 1941, and admittedly it did not require an election by dual nationals who were such from birth.

A. *The language and history of the 1907 act show that it sets forth the only bases for loss of citizenship and that Congress specifically rejected long-continued residence abroad as a ground for loss of native-born American citizenship.*

1. The 1907 legislation came, as we have noted (*supra*, p. 32), as a result of a report of a special Citizenship Board which was directed to "inquire into the laws and practice regarding citizenship of the United States, expatriation, and protection abroad, and to report recommendations for legislation to be laid before Congress," pursuant to the recommendation of the Committee on Foreign Affairs of the House of Representatives. The Board returned a comprehensive report (H. Doc. No. 326, 59th Cong., 2d sess.), containing recommendations and observations on all phases of the subject matter referred to it and appendices setting forth the existing laws, foreign and domestic, on the subject, and judicial determinations on the various issues.

As we have pointed out (*supra*, pp. 32–33), it seems fairly evident, from the discussion of existing law in the appendices, that the Board was of the view that there was a recognized doctrine of compulsory election on the part of dual nationals at birth, although, as noted in Point II, *supra*, pp. 23–28, the cases relied upon for that conclusion do not support the broad interpretation which the Board reached. The drafters of the Report appear to have thought of election as something

different from expatriation. They did not deal with "election of citizenship" as part of their discussion of expatriation, but rather as part of their discussion of citizenship by birth. Compare pp. 74–76 and 79–80 with pp. 160–168 of H. Doc. No. 326, 59th Cong., 2d sess. Moreover, in discussing *Calais* v. *Marshfield*, 30 Me. 511 (see, *supra*, p. 25), the Report appended a footnote (p. 76, n. a) stating: "The remarks of the court here seem to contemplate an act of expatriation rather than merely a question of election."

Nevertheless, the recommendations of the Board made no attempt to codify this concept by legislation, for a reason which becomes evident when its proposals are examined. The Board proposed, as a basis for assuming expatriation of *all* citizens, not only naturalization in a foreign state and the taking of an oath of allegiance (in its recommendation this was limited to the oath in connection with governmental office), but also:

> Third. When he becomes domiciled in a foreign state, and such domicile shall be assumed when he has resided in a foreign state for five years without intent to return to the United States; but an American citizen residing in a foreign state may overcome the presumption of expatriation * * *. [H. Doc. No. 326, 59th Cong., 2d sess., pp. 3, 23.]

Such legislation would of course have obviated any issue as to election of citizenship by a dual

national by long continued residence abroad, since such residence would have been *prima facie* (but only *prima facie*) evidence of loss of citizenship by all citizens.

Congress, however, did not accept the idea of domicile abroad as grounds for expatriation of an American citizen by birth. When this recommendation was finally enacted, in the second paragraph of Section 2 of the Act (*supra*, p. 3), it appeared as follows:

> When any *naturalized* citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed to be his place of residence during said years: *Provided, however,* That such presumption may be overcome * * *. [Italics supplied.]

The propriety of limiting the legislation to naturalized citizens was challenged on the floor of Congress, but was sustained. 41 Cong. Rec. 1463–1467. The inference is certainly permissible that, as a matter of "Congressional intention," Congress in 1907 laid down the rule that the citizenship of native-born Americans would not be affected merely by long-continued foreign residence. Cf. *United States ex rel. Anderson* v. *Howe*, 231 Fed. 546 (S. D. N. Y.).

A similar comparison suggests the same conclusion. The Board made two suggestions (H. Doc. No. 326, 59th Cong., 2d sess., p. 2):

> That every male child being an American citizen resident abroad who desires to enjoy the protection of this Government be required upon reaching the age of 18 years to record at the most convenient American consulate his intention to become a resident and remain a citizen of the United States, and to take the oath of allegiance upon attaining his majority.
>
> That an American citizen residing continuously outside of the United States for more than one year be required to register at the most convenient United States consulate at least once each year * * * and to give solemn assurance of his continued allegiance to the United States and of his intention to return thereto. * * *

The first of these recommendations appeared in the enacted law as follows:

> SEC. 6. That all children *born outside the limits of the United States* who are citizens thereof [because of the citizenship of their parents] and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States

> and shall be further required to take the oath of allegiance to the United States upon attaining their majority. [Italics supplied.]

The second recommendation was not enacted at all.

Again, we have explicit indication that Congress did not intend to limit the rights of native-born Americans to stay in foreign countries for indefinite periods of time, and that it rejected such a ground as a basis, not only for loss of citizenship, but even for loss of protection. The distinction Congress made was between native-born and foreign-born Americans, when it limited these proposed recommendations with respect to the effect of domicile abroad. To hold that native-born citizens may lose their citizenship by residence abroad under the doctrine of election would require an additional distinction to be read into the statute, a distinction between native-born citizens having one nationality and those having dual nationality. Since Congress did not draw that distinction we do not believe it is the function of the executive or the courts to do so, particularly where loss of constitutionally conferred rights is involved.

The whole tenor of the 1907 Act rejects the idea of foreign residence alone as a basis for loss of citizenship by native-born Americans. Even the Citizenship Board's recommendations, referred to above (*supra*, pp. 69, 71–72), made foreign

residence only *prima facie* evidence of expatriation. And, as we have noted, Congress limited that presumption to *naturalized* Americans. As to the one aspect of dual nationality with which the act does to some extent deal, *i. e.*, foreign-born children of American citizens, Congress did not seem to have contemplated return to the United States as a condition of retaining American citizenship. It limited the right of protection to those who asserted their nationality at 18 and took the oath of allegiance at 21. The implication is that those taking such oath at majority would thereafter be subject to protection, and manifestly therefore citizens, even if they continued to reside abroad.

In an age of far-flung commercial enterprise and increasing travel, Congress could well have thought that foreign residence would necessarily become less and less indicative of the assumption of a new allegiance. Cf. *United States* v. *Knight*, 299 Fed. 571 (C. A. 10); State Department Instruction issued July 26, 1910, calling attention to Circular Instructions of March 27, 1899, III Hackworth, *Digest of International Law*, 279; Flournoy, *International Problems in Respect to Nationality by Birth*, 1923 *Proceedings, American Society of International Law*, 59, 64. And compare the opinion in *United States ex rel. Fracassi* v. *Karnuth*, 19 F. Supp. 581, 583 (W. D. N. Y.) (taking oath of allegiance to foreign state) with that in *Petition of Zogbaum*, 32 F. 2d 911 (D.

S. D.) (in part, long continued residence); see also *Banning* v. *Penrose*, 255 Fed. 159 (N. D. Ga.) (long continued residence in country of origin); *United States ex rel. Anderson* v. *Howe*, 231 Fed. 546, 547 (S. D. N. Y.) (semble).

In any case, it would, it seems to us, be a strained interpretation of the scope of the 1907 Act to hold that, while it rejected residence abroad as a ground for loss of United States citizenship not conferred by the Constitution, it contemplated loss by residence abroad of rights of citizenship conferred by the Constitution. Cf. Nielsen, *Some Vexatious Questions Relating to Nationality*, (1920) 20 Col. L. Rev. 840, 853–854.

2. For the sake of completeness, we shall deal at this point with one possible objection to this argument that the variance between the Citizenship Board's suggestions and the actual statute, taken together with the legislative attitude toward residence abroad, negate the concept that citizenship acquired by birth could be lost by long continued residence abroad. The Board's proposals and the Act, despite their generally comprehensive character, did not undertake to regulate or define citizenship at birth as conferred by existing statutes on foreign-born children of American citizens. It could possibly be contended that, since the Board apparently thought of the doctrine of election was related to questions

of citizenship by birth rather than to expatriation (*supra*, pp. 68–69), the congressional change in the Board's suggested basis for expatriation did not affect the duty of election of citizenship by dual nationals at birth. The argument would be that the principle of election by dual nationals stands on a wholly different footing from the doctrine of expatriation, and that Congress by the 1907 Act was legislating as to expatriation or change of nationality, not as to election of one nationality to the exclusion of the other by those who had dual citizenship at birth.

There are, we think, a number of considerations which militate against this conclusion. First, a simple one. Whatever it is called, and whatever the Board thought, application of the doctrine of compulsory election to a native born citizen would result in loss of United States citizenship conferred by the Constitution. However one states the argument that loss of citizenship by failure to elect is not expatriation, it ultimately becomes contradictory. For, on the one side, expatriation is defined to be the voluntary loss of citizenship. *Perkins* v. *Elg*, 307 U. S. at 334. And, on the other, loss of citizenship by failure to elect, or by long-continued foreign residence, is upheld only when conditions are such that it can be voluntary. The result, whether it is called expatriation or not, is the same—a voluntary act resulting in loss of citizenship.

Moreover, there is no indication that Congress thought of loss of nationality by virtue of the application of the principle of election as something different from expatriation. Other than the relatively obscure statements in the appendices to the Board's Report, to which we have referred (*supra*, pp. 32–33, 68–69), there was no discussion of election of citizenship. And, as we have pointed out in Point II, the concept of the duty of election can hardly be said to have been a concept already clearly established and fully articulated in the law. It should be particularly noted that most of the cases cited in the Report relating to the duty of election arose before the Fourteenth Amendment made citizenship by birth a constitutional right, and that, of the federal cases after that period, the discussion in one (*Trabing* v. *United States*, 32 C. Cls. 440, 443 (1897)) was concededly dictum and relates to a very different problem (H. Doc. No. 326, p. 76), and the other, *Ware* v. *Wisner*, 50 Fed. 310 (C. C. D. Ia., 1883), did *not* recognize the duty of election, even as to foreign born children of Americans (H. Doc. No. 326, p. 80).

And Congress did legislate, after the Board had broached the general problem of dual nationality (H. Doc. No. 326, 59th Cong., 2d Sess., pp. 23–28, 77–80), on three aspects of that problem: (a) a naturalized citizen returning to the state from which he came (*supra*, p. 70); (b) American women marrying aliens (*Mackenzie* v. *Hare*, 239 U. S. 299); and (c) foreign born children of

Americans (*supra*, pp. 71–72). This seems to us sufficient proof that Congress had before it the general class of problem with which we are now concerned; whether the subject matter be called expatriation or something else, and that it deliberately chose to require an explicit or implicit election only in the case of the foreign born American—naturalized citizens and foreign born children of Americans.

3. Somewhat more hesitantly, we go further than the contention that the 1907 Act precluded use thereafter of a principle of compulsory election for dual nationals by birth. It seems probable that Congress, in 1907, contemplated that citizenship could be lost only by the clear unequivocal acts evincing attachment to another sovereign with which it specifically dealt. Both naturalization in a foreign country and taking an oath of allegiance to a foreign power, as bases of expatriation, are at once clear and direct expressions of allegiance, and possessed of an historical force in American law which makes it reasonable to suppose that Congress thought it sufficient to restrict expatriation to those grounds. Cf. *Savorgnan* v. *United States*, 338 U. S. 491, 497–8; III Moore, *Digest of International Law*, 518–519, 574, 575.

The Citizenship Board's Report dealt comprehensively with loss of nationality and its recommendations for legislation appear intended to cover the subject. In picking and choosing, in

modifying the Board's proposals, Congress seems to have intentionally chosen what law there should be in this entire field, rather than to have legislated only partially with a view to administrative or judicial solution of the remaining problems. See Tsiang, *The Question of Expatriation in America Prior to 1907* (1942), Johns Hopkins University Studies in Historical and Political Science, Series LX, No. 3, pp. 103–109.

This conclusion seems particularly borne out by the final sentence of the second paragraph of section 2 of the Act, which states: "*And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war." *Supra,* p. 3. This language comes after the provision stating the two circumstances in which an American would be deemed to have expatriated himself, and the further provision that foreign residence for designated periods should give rise to a presumption that naturalized citizens had ceased to be American citizens.

It seems to us that this war time limitation, which would obviously be a limitation of general application, indicates that the provisions preceding it were of equally general breadth, in what they omitted as well as in their coverage. It indicates, too, the unlikelihood that Congress thought that there remained outstanding some method of losing citizenship, as to which, it might at least be argued, the war time limitation had no application.

4. As we noted in Point II, *supra*, pp. 34–39, in the 1920's the State Department, which had theretofore upon occasion and by way of dictum taken the view that the duty of election existed independently of the 1907 statute, came to the conclusion, upon fuller consideration, that loss of citizenship, as distinguished from loss of the right to protection, could result only from performance of an act specified by Congress. Specifically, the Department disavowed any requirement of election for dual citizens by birth. The Immigration and Naturalization Service was of the same view as to a duty of election. At the time petitioner came of age in 1928 both agencies would have told him, if he had inquired, that an election was not necessary.

The cases since 1907 have also been set forth above, at pp. 40 ff. On the specific issue of the duty of election for dual nationals like petitioner, there is no decision upholding the requirement prior to the decision below, but there are some general remarks which lean, more or less explicitly, in that direction. There are two or three holdings or remarks to the contrary. On the broader question of the exclusiveness of the means of expatriation listed in the 1907 Act, there are a holding of the Ninth Circuit that the statute is exclusive (*Leong Kwai Yin* v. *United States*, 31 F. 2d 738, 740 (C. A. 9)), and opposing dicta by the Second Circuit (*United States* v. *Husband*, 6 F. 2d 957, 958 (C. A. 2) and a Pennsylvania District Court

(*United States ex rel Rojak* v. *Marshall*, 34 F. 2d 219 (W. D. Pa.)).

B. *The Nationality Act of 1940 also set forth the only bases for loss of nationality and rejected any duty of election for native born dual nationals*

In 1940, Congress enacted a comprehensive revision of the laws relating to citizenship and nationality, which became effective in January 1941. Nationality Act of 1940, 54 Stat. 1137. The Act was originally drafted, at the request of Congress, by representatives of the Departments of State, Labor, and Justice. See Hearings before the Committee on Immigration and Naturalization of the House of Representatives, on H. R. 6127, superseded by H. R. 9980, 76th Cong., 1st sess., p. 28. The matter had been under special study in the three departments since April 1933. Exec. Order No. 6115, dated April 25, 1933. In 1938, the President transmitted to Congress a Report on the Revision and Codification of the Nationality Laws of the United States, together with a proposed nationality code, prepared by the three departments. In recognition of the legislative purpose to codify the law, the Chairman of the Committee stated at the outset of the hearings (p. 28):

> Five or six years ago the matter was brought up. It was realized then that there was a great need for codification of all these laws and we went and asked that there be a report prepared by the Depart-

> ments of State and Labor and Justice. The President approved of that and that was done.
>
> Now the Departments of State, Labor, and Justice have worked very hard and they have brought out a full codification of all of these laws. * * *
>
> Now, up to this time, the law on this subject has never been modified or changed, but it has been all mixed up. From the laws as they existed you would not know who is who or what is what. Then the question came up time and time again in regard to lost citizenship and all these matters required to make up a definite code to understand what the law is on any subject.

In the light of this background, we think that in the Nationality Act of 1940, even more than in the Immigration Act of 1906, Congress must be deemed to have formulated "a self-contained exclusive procedure." See *Bindczyk* v. *Finucane*, 342 U. S. 76, 83. And in particular, we believe that the history and terms of the 1940 Act (1) indicate the definite rejection by Congress of a principle of compulsory election for dual nationals at birth, at the same time showing that that principle had not theretofore been incorporated into the American law on loss of nationality, and (2) prove that the Act's methods of expatriation are exclusive, so that if petitioner was an American when the Act became effective in January 1941 he clearly did not lose his citizenship thereafter.

1. While, of course, the intent of the legislature in 1940 is not relevant to the intent of the legislature in 1907, the history of that legislation does emphasize the point made above that there was not in the period prior to 1940—and particularly in the period between 1928 when petitioner reached his majority and 1937 when he says he first tried to assert American citizenship—any well-established doctrine of compulsory election for dual nationals by birth, recognized by the agencies concerned with the administration and interpretation of the laws relating to nationality. The fact is that when the legislation was being drafted, the State Department suggested a *new* provision to the effect that an American-born national taken during minority to the country of his other nationality be required, on reaching majority, to make an election and to return to the United States if he elected American nationality. This provision was opposed by the Departments of Justice and Labor and was therefore omitted from the proposed bill which became the Nationality Act (Hearings, *supra*, pp. 248, 267–268).[32]

It is difficult to reconcile this explicit rejection of a duty to evince election by taking up residence in this country with the theory that there was a

[32] It is also significant that, as originally proposed by the Departments, the bill would have provided for expatriation by using a passport of a foreign state as a national thereof (Hearings, *supra*, p. 491) but this provision was dropped by the Committee. See Hearings, pp. 387–388; *Kawakita* v. *United States*, 343 U. S. 717, 725.

well established principle of compulsory election prior to 1940. The drafters of the 1940 act showed no disposition to limit the recognized grounds for loss of nationality.[37] On the contrary, they considerably broadened the bases for expatriation by providing for expatriation by serving in a foreign army (Sec. 401 (c)), holding foreign office (Sec. 401 (d)), or voting in a foreign political election (Sec. 401 (e)). See *Savorgnan* v. *United States*, 338 U. S. 491, 501 (fn.). Section 402, dealing specifically with persons having dual nationality (see *Kawakita* v. *United States*, 343 U. S. 717, 730), was also new, and may represent an attempt to deal in less drastic form with the problem of dual nationals which the State Department had desired to resolve by a full application of the election doctrine. Other sections of the Act likewise went far beyond the prior law. See Flournoy, *Fundamental Principles Relating to Ascertainment of Nationality* (1949), 10 Fed. Bar J. 275, 283–5.

Moreover, it is unreasonable to believe that the Departments of Justice and Labor would have objected to inclusion of the suggested election provision in the comprehensive codification then in progress if they considered that the proposed rule

[37] They covered all the grounds of expatriation dealt with in the 1907 Act and in other legislation (*i. e.*, loss of citizenship on conviction for treason). They also developed a statutory provision (Sec. 401 (a)) covering the situation of *Perkins* v. *Elg*—the native born American naturalized abroad through his parents during his minority.

stated existing law. The State Department's own view of existing law was stated by Mr. Flournoy as follows (Hearings, *supra*, p. 37):

> Another class is composed of those persons who are born in the United States of alien parents and are taken by their parents to the countries from which the parents came and of which they are nationals. That is a dual nationality.
>
> Many of them are taken in early infancy. There are hundreds of thousands of those persons living around different parts of the world who happen to have been born here and acquire citizenship under the fourteenth amendment, but they are brought up in the countries of their parents and they are in no true sense American, and yet they may not only enter this country themselves as citizens, but may marry aliens in those countries and have children and those children are born citizens.
>
> * * * * * * *
>
> * * * He can live all he pleases in his father's country, and if he does not take the oath of allegiance, if he avoids doing that, he remains a citizen of the United States.

Nor can the explicit rejection of the proposed provision be regarded as merely evincing an intent to leave the question of the principle of election by dual nationals for ultimate judicial determination. In the first place, the Act of 1940 did not merely codify existing law. As noted above, it created new grounds for loss of national-

ity. In the second place, the 1940 Act, in contrast to the 1907 Act, defined nationality at birth (Sec. 201) and contained residence requirements as to foreign-born children only one of whose parents was a citizen (Sec. 201 (g), (i)). The discussions show that the problems of dual nationality and foreign residence were considered and debated (see *supra*, pp. 82–84), and, to the extent agreement could be reached, codified. Thus, the Act codified the rule of *Perkins* v. *Elg*, 307 U. S. 325, as to American-born citizens acquiring dual nationality during minority through the nationalization of the parents (Sec. 401 (a)) or through loss of American nationality by the parent (Sec. 407). As we have mentioned (*supra*, p. 83), Section 402, creating a presumption of the expatriation of a dual national by reason of residence in the country of his other nationality, also deals with the problem of dual nationals.

Since the 1940 Act was passed, the administrative agencies (State Department and the Immigration and Naturalization Service) have taken the position that there was no requirement of compulsory election for dual nationals like petitioner. See *supra*, pp. 34–39.

It is clear, we submit, that the 1940 Act represents an explicit rejection of the principle of election as to dual nationals at birth. And this explicit rejection, we believe, adds support to the other factors heretofore discussed which have led us to entertain very great doubt as to whether

the doctrine of election ever applied to native-born citizens having dual nationality at birth (*supra*, p.. 23–62), and to the conclusion that, if such principle ever had vitality, it ceased to be operative after the enactment of the law of March 2, 1907 (*supra*, pp. 68–77).

2. As with the 1907 Act, but with less diffidence, we also suggest the broader proposition that the methods of expatriation contained in Chapter IV of the 1940 Act (*infra*, pp. 94–97) are exclusive.[34] The 1940 Act was very comprehensive legislation dealing with all phases of acquisition and loss of nationality. The congressional effort was to enact a complete code. Admittedly, the statute went beyond existing law. *Supra*, pp. 80–85. We suggest that such a full-scale revision and elaboration of the rules for expatriation put an end to whatever "common law" of loss of nationality may theretofore have existed.

Moreover, Section 408 of the Act (8 U. S. C. 808) expressly provides: "The loss of nationality under this Act shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this Act." In terms, this provision, which is headed "Exclusiveness of means of losing nationality" in the United States Code (8 U. S. C. 808), forbids reliance on acts

[34] If this is so, petitioner clearly did not expatriate himself after the Act took effect in January 1941, since he did not voluntarily perform any of the statutory acts of expatriation.

other than those specified in the loss-of-nationality sections of the 1940 Act, as amended. It may be, as the report of the drafting committee shows, that Congress also had in mind the purpose of making "it clear beyond question that loss of nationality under a provision of chapter IV [Loss of Nationality] in no way depends upon a ruling of any officer of the United States" (Hearings, p. 504). But the language of Section 408, taken together with the background and object of the whole Act, does establish, we think, that Congress intended the means of expatriation listed in chapter IV to be exclusive.[35]

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[35] The opinion below suggests that the words "under this Act" show that Section 408 was not meant as an exclusiveness provision (R. 32–3). The answer seems to us to be that (a) there are now no statutes other than the 1940 Act dealing with expatriation, except the general declaration of 1868 (8 U. S. C. 800), since the 1940 Act repealed the prior legislation, and (b) the reference to "loss of nationality *under this Act*" probably was intended, as an additional precaution, to preserve all treaties and conventions dealing with expatriation. See Section 41[illegible] of the Nationality Act, 8 U. S. C. 810, *infra*, p. 97.

In view of the comprehensiveness of the 1940 Act, we do not believe that the continued existence of the 1868 declaration on the books (8 U. S. C. 800, *supra*, p. 2), is an invitation to judicial formulation of additional modes of expatriation. The language of the earlier statute is broad enough to cover, and does cover, the expatriation of Americans, but when enacted it was, as its terms show, "intended to apply especially to immigrants into the United States" and to "secure for them full recognition of their newly acquired American citizenship." *Savorgnan* v. *United States*, 338 U. S. 491, 498, fn. 11; Tsiang, *The Question of Expatriation in America Prior to 1907* (1942), Johns Hopkins University Studies in Historical and Political Science,

C. For the future the issue is settled by the Immigration and Nationality Act of 1952

Section 350 of the Immigration and Nationality Act of June 27, 1952, Pub. Law 414, 82d Cong., 2d sess., 66 Stat. 269 (which goes into effect in January 1953) provides:

> *Duals Nationals; Divestiture of Nationality*
>
> SEC. 350. A person who acquired at birth the nationality of the United States and of a foreign state *and who has voluntarily sought or claimed benefits of the nationality of any foreign state* shall lose his United States nationality by *hereafter* having a continuous residence for three years in the foreign state of which he is a national by birth at any time after attaining the age of twenty-two years unless he shall—
>
> (1) prior to the expiration of such three-year period, take an oath of allegiance to the United States before a United States diplomatic or consular officer in a manner prescribed by the Secretary of State; and
>
> (2) have his residence outside of the United States solely for one of the reasons set forth in paragraph (1), (2), (4), (5), (6), (7), or (8) of section 353, or paragraph (1) or (2) of section 354 of this title: *Provided, however,* That nothing con-

Series LX, No. 3, pp. 86–88. Because of its application to naturalized Americans *vis à vis* their former states and its status as an historically significant communication to other nations, Congress probably thought it inappropriate to repeal it when the 1940 Act was passed.

tained in this section shall deprive any person of his United States nationality if his foreign residence shall begin after he shall have attained the age of sixty years and shall have had his residence in the United States for twenty-five years after having attained the age of eighteen years. [Italics supplied.] [36]

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[36] The pertinent parts of Sections 353 and 354 provide:

"SEC. 353:

* * * * *

"(1) has his residence abroad in the employment of the Government of the United States; or

"(2) is receiving compensation from the Government of the United States and has his residence abroad on account of disability incurred in its service; or

* * * * *

"(4) had his residence abroad on October 14, 1940, and temporarily has his residence abroad, or who thereafter has gone or goes abroad and temporarily has his residence abroad, solely or principally to represent a bona fide American educational, scientific, philanthropic, commercial, financial, or business organization, having its principal office or place of business in the United States, or a bona fide religious organization having an office and representative in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation; or

"(5) has his residence abroad and is prevented from returning to the United States exclusively (A) by his own ill health; or (B) by the ill health of his parent, spouse, or child who cannot be brought to the United States, whose condition requires his personal care and attendance: *Provided*, That in such case the person having his residence abroad shall, at least every six months, register at the appropriate Foreign Service office and submit evidence satisfactory to the Secretary of State that his case continues to meet the requirements of this subparagraph; or (C) by reason of the death of his parent, spouse, or child: *Provided*, That in the case of the

The Act resulted from the merger of the so-called Walter (H. R. 5678, 82d Cong.) and McCarran bills (S. 2550, 82d Cong.), both of which contained a Section 350 providing for loss of

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death of such parent, spouse, or child the person having his residence abroad shall return to the United States within six months after the death of such relative; or

"(6) has his residence abroad for the purpose of pursuing a full course of study of a specialized character or attending full-time an institution of learning of a grade above that of a preparatory school: *Provided*, That such residence does not exceed five years; or

"(7) is the spouse or child of an American citizen, and who has his residence abroad for the purpose of being with his American citizen spouse or parent who has his residence abroad for one of the objects or causes specified in paragraph (1), (2), (3), (4), (5), or (6) of this section, or paragraph (2) of section 354 of this title; or

* * * * * * *

"SEC. 354:

* * * * * * *

"(1) who is a veteran of the Spanish-American War, World War I, or World War II, and the spouse, children, and dependent parents of such veteran whether such residence in the territory of a foreign state or states commenced before or after the effective date of this Act: *Provided*, That any such veteran who upon the date of the enactment of this Act has had his residence continuously in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated for three years or more, and who has retained his United States nationality solely by reason of the provisions of section 406 (h) of the Nationality Act of 1940, shall not be subject to the provisions or requirements of section 352 (a) (1) of this title: *Provided further*, That the provisions of section 404 (c) of the Nationality Act of 1940, as amended, shall not be held to be or to have been applicable to veterans of World War II;

"(2) who has established to the satisfaction of the Secretary of State, as evidenced by possession of a valid unexpired

nationality by a dual national residing more than three years in the foreign state of his other nationality after attaining 22 years, unless he takes an oath of allegiance to the United States and continues his foreign residence solely for prescribed purposes comparable to those now set forth in the Act.[37] See H. Rep. 1365, 82d Cong., 2d Sess., pp. 87, 303–4; S. Rep. 1137, 82 Cong., 2d Sess., p. 49. This provision was described, in an earlier version, by the Senate Committee on the Judiciary as "a new provision". S. Rep. 1515, 81st Cong., 2d Sess., p. 768.

As introduced and originally passed by both Houses, the bills simply provided for loss of American nationality by a dual national "who

United States passport or other valid document issued by the Secretary of State, that his residence is temporarily outside of the United States for the purpose of (A) carrying on a commercial enterprise which in the opinion of the Secretary of State will directly and substantially benefit American trade or commerce; or (B) carrying on scientific research on behalf of an institution accredited by the Secretary of State and engaged in research which in the opinion of the Secretary of State is directly and substantially beneficial to the interests of the United States; or (C) engaging in such work or activities, under such unique or unusual circumstances, as may be determined by the Secretary of State to be directly and substantially beneficial to the interests of the United States;"

[37] The House bill did not apply this provision to a person living in the United States for ten years between ten and twenty-five. Both bills also exempted those over 60 who had lived in the United States for 25 years after having attained 18.

has not succeeded in legally divesting himself of the nationality of the foreign state" and who did not fulfill the prescribed conditions. In conference, Section 350 was significantly changed to substitute for the clause quoted above the clause now appearing in the Act (italicized on p. 88, *supra*): "who has voluntarily sought or claimed benefits of the nationality of any foreign state." The Statement of the Managers on the Part of the House says, in reference to this change, that "In composing the differences between the Senate and House bills as they appeared in the section relating to termination of dual nationality, the conferees have modified the language so as to remove any doubt that the loss of United States citizenship should occur by any other than affirmative action taken by the dual national" (H. Rep. 2096, 82d Cong., 2d Sess., p. 129). See also Senator McCarran's comparable statement to the Senate. 98 Cong. Rec. 7164 (daily ed., June 11, 1952) (the conferees "modified the language so as to remove any doubt that the loss of United States citizenship *by a native-born, dual national* could occur except by an affirmative act taken by him" (Italics supplied).

The new Act is not, of course, involved in the present case, but we think it relevant for these reasons: (a) it seems to assume that the principle of compulsory election for dual nationals at birth, which it embodies, is new to our law; (b) by the detailed exceptions and qualifications

it makes in the application of the doctrine of compulsory election (*supra*, pp. 88–91), it shows that the problem is essentially a legislative one (see *supra*, pp. 62–64); and (c) by its emphasis on affirmative action by the dual national, *i. e.*, on the voluntary seeking and claiming of the benefits of the foreign nationality, it seems to indicate that mere residence abroad, without more, will not be deemed an election against United States nationality.

CONCLUSION

For the reasons stated, we believe that the decision of the Court of Appeals should be reversed, with directions to remand the case to the District Court for the entry of an order declaring that petitioner is a citizen of the United States.

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APPENDIX

Section 401 of the Nationality Act of 1940, 54 Stat. 1137, 1168, as amended, 8 U. S. C. 801, provides:

> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> (a) Obtaining naturalization in a foreign state, either upon his own application or through the naturalization of a parent having legal custody of such person: *Provided, however,* That nationality shall not be lost as the result of the naturalization of a parent unless and until the child shall have attained the age of twenty-three years without acquiring permanent residence in the United States: *Provided further,* That a person who has acquired foreign nationality through the naturalization of his parent or parents, and who at the same time is a citizen of the United States, shall, if abroad and he has not heretofore expatriated himself as an American citizen by his own voluntary act, be permitted within two years from the effective date of his [sic] Act to return to the United States and take up permanent residence therein, and it shall be thereafter deemed that he has elected to be an American citizen. Failure on the part of such person to so return and take up permanent residence in the United States during such period shall be deemed to be a determination on the part of such person to discontinue his status as an American citizen, and such person shall be

forever estopped by such failure from thereafter claiming such American citizenship; or

(b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or

(c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; or

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; or

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

(f) Making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State; or

(g) Deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged from the service of such military or naval forces: *Provided*, That notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous laws by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to January 20, 1944, shall be

deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom; or [the *proviso* was added by the Act of January 20, 1944, c. 2, sec. 1, 58 Stat. 4]

(h) Committing any act of treason against, or attempting by force to overthrow or bearing arms against the United States, provided he is convicted thereof by a court martial or by a court of competent jurisdiction; or

(i) Making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense; or [added by the Act of July 1, 1944, c. 368, sec. 1, 58 Stat. 677]

(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States [added by the Act of September 27, 1944, c. 418, sec. 1, 58 Stat. 746].

Section 402 of the Nationality Act of 1940, 8 U. S. C. 802, provides:

> A national of the United States who was born in the United States or was born in any place outside of the jurisdiction of the United States of a parent who was born in the United States, shall be presumed to have expatriated himself under subsection

(c) or (d) of section 401, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, or within any place under control of such foreign state, and such presumption shall exist until overcome whether or not the individual has returned to the United States. Such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, or to an immigration officer of the United States, under such rules and regulations as the Department of State and the Department of Justice jointly prescribe. However, no such presumption shall arise with respect to any officer or employee of the United States while serving abroad as such officer or employee, nor to any accompanying member of his family.

Section 408 of the Nationality Act of 1940, 8 U. S. C. 808, provides:

> The loss of nationality under this Act shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this Act.

Section 410 of the Nationality Act of 1940, 8 U. S. C. 810, provides:

> Nothing in this Act shall be applied in contravention of the provisions of any treaty or convention to which the United States is a party upon the date of the approval of this Act [October 14, 1940].

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